Liquor Industry Bargaining Group and Fedway Associates *and* Local 19d, Wine and Liquor Salesmen of New Jersey, United Food and Commercial Workers, AFL–CIO

Royal Division of R&R Marketing, L.L.C. *and* Local 19d, Wine and Liquor Salesmen of New Jersey, United Food and Commercial Workers, AFL–CIO

The Jaydor Corporation *and* Local 19d, Wine and Liquor Salesmen of New Jersey, United Food and Commercial Workers, AFL–CIO. Cases 22–CA–19915, 22–CA–20497, and 22–CA–20963

May 2, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On April 15, 1997, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

1. The 8(a)(5) allegation against Respondent Liquor Industry Bargaining Group

The Union represents sales representatives employed by the employer-members of Respondent Liquor Industry Bargaining Group (the Group), a multiemployer group composed of wholesale liquor distributors, and has had a collective-bargaining relationship with the Group over many years. The most recent collective-bargaining agreement between the Union and the Group ran from October 1, 1990, to September 30, 1993. In mid-1993, the Union and the Group began negotiating the terms of a successor collective-bargaining agreement. Following months of bargaining to reach a successor agreement, including a 16-day strike by unit members, the Group made a final contract proposal to the Union on March 24, 1994. By letter dated May 13, 1994, the Group announced that it planned to implement the final proposal on June 1, 1994. The Group's final proposal encompassed a number of modifications to the expired agreement, most dramatically the unit members' compensation plan.

Article 6.01 of the expired agreement provided a basic 5-percent commission rate to be paid to employees on the sales of all liquor, with slightly different rates for domestic still wine and other items. Sales representatives made the bulk of their annual salary through these commissions. The Group's final proposal altered article 6.01 by eliminating the commission-based compensation plan and, in its stead, establishing that "sales representatives shall be compensated in accordance with the wage and salary programs put into effect by the Employer."

The new plan guaranteed a 1-year transitional salary of the lesser of 75 percent of the sales representative's prior year's commissions or $50,000. It further guaranteed a minimum annual salary of $25,000 to each sales representative. However, the new wage proposal was silent as to how the Group's member-employers would set each sales representative's wage. The proposal stated that prior to implementation of the new wage structure, the Employer would provide each sales representative and, upon request, the Union, with "a written explanation of the wage and salary compensation program applicable to that sales representative." In addition, article 6.01 of the Group's final proposal exempted the terms of the proposed compensation plan from the contract's grievance and arbitration procedures. The final offer also included the no-strike, no-lockout language of the prior contract. Thus, under the final contract proposal, the unit employees and their representative would have no input into the establishment of their compensation, and would have no means by which to dispute it following its implementation.

During negotiations, the Union sought details from the Group regarding the meaning and implications of the new article 6.01. At the bargaining table, the Union requested information from the Group's negotiators regard-

[1] The Respondents move to reopen the record to introduce a collective-bargaining agreement dated March 31, 1997, and the certification of results of election in Case 22–RD–1287 dated May 11, 2000. The Respondents claim that this agreement shows the Union accepted a proposal similar to one at issue in the instant case, and consequently rebuts the judge's finding that their wage proposal unlawfully derogated the Union. Further, the Respondents claim the decertification by Fedway unit employees evidences that the employees do not object to the proposal that the judge found unlawful.

We deny the motion to reopen the record as it seeks to adduce evidence of events occurring after the close of the hearing. See *Modern Drop Forge Co.*, 326 NLRB 1335 fn. 1 (1998); *WXRK*, 300 NLRB 633 fn. 1 (1990); *Contemporary Guidance Services*, 291 NLRB 50 fn. 2 (1988). Furthermore, we find that such evidence does not compel a different result in the instant case. That the Union accepted the agreement the Respondents seek to introduce, or that Fedway employees have chosen to decertify the Union, has no bearing on whether their course of conduct in the instant case constitutes bad-faith bargaining.

Citing Sec. 102.46(h) of the Board's Rules and Regulations, the Respondents request special leave to file a supplemental brief addressing "the applicability and impact upon this case" of *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000). The Board takes notice of the court's decision, but denies the request for further briefing. In addition, the Board finds the court's decision to be distinguishable for the reasons stated infra.

ing the method the Group intended to use to set compensation for each sales representative, and emphasized that it wanted to maintain its representative role in negotiating compensation. Shortly before the Group's scheduled implementation date, the Union requested by letter "certain very basic information—namely, [the Union] must know exactly what compensation is to be implemented for each and every unit salesperson . . . and how such level of compensation has been determined for each such unit employee." In response to the Union's repeated inquiries during negotiations, the Group stated only that it was seeking "complete flexibility" in setting sales representatives' compensation, that it would not be "locked into specifics," and that it would advise the Union in writing as to the "timing, criteria and procedures" for determining pay prior to making any changes in compensation packages.

The Group's final offer included changes to other significant contract provisions as well. In particular, the final offer deleted the provisions of article 10.02 of the expired agreement that required the Employers, when removing and reassigning retail accounts to sales representatives, to replace lost accounts with other accounts of "substantially equal volume." In addition, the final offer deleted the provisions of article 12 that prohibited supervisors from performing unit work, and eliminated a prohibition against "house accounts," thereby permitting Employers to make sales to large, warehouse-style retail outlets through the "house" without the involvement of, and the payment of a commission to, a sales representative. Together with the modification to the compensation structure, these proposals constituted a vast change to the sales representatives' basic terms and conditions of employment.

The judge found, and we agree, that the totality of the Group's conduct during negotiations evidenced an intent to frustrate agreement on a collective-bargaining contract with the Union, and that such conduct constitutes bad-faith bargaining in violation of Section 8(a)(5) of the Act. The relevant principles are well established.

The proposal at issue here, which would have granted the employer-members of the Group broad discretionary authority over wages, is a mandatory subject of bargaining over which a party may bargain in good faith to a bona fide impasse. See *McClatchy Newspapers*, 321 NLRB 1386, 1388 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). In determining whether a party has complied with the duty to bargain in good faith, the Board looks to whether the party's conduct "evidences a real desire to reach an agreement—a determination made by examination of the record as a whole." *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982), enfd. 701 F.2d 172 (5th Cir. 1983).

Specific contract proposals may be considered in determining whether a party has bargained in bad faith. *Reichhold Chemicals*, 288 NLRB 69 (1988), enfd. 906 F.2d 719 (DC Cir. 1990). A finding of bad faith, however, does not depend on whether a proposal would be acceptable or unacceptable. Rather, the Board's examination of a proposal focuses on whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining agreement. Id. In examining the totality of bargaining conduct, unrealistically harsh or extreme proposals can serve as evidence that the party offering them lacks a serious intent to adjust differences and reach an acceptable common ground. *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 858 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984).

For example, it is not a per se violation of Section 8(a)(5) merely to propose a management rights clause that vests exclusive control in the employer on a particular employment issue. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). However, some management proposals that seek to secure the employer's right to act in a unilateral and unrestricted fashion on *key* terms and conditions of employment, such as establishing total employer discretion over wages and the assignment of unit work in conjunction with the diminution or abolition of grievance and arbitration processes, create a fundamental shift in the bargaining relationship and may effectively nullify the union's ability to carry out its statutory function as the employees' bargaining representative. *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991). Management rights proposals that are so comprehensive as to essentially preempt the union's representative function, and, if accepted, would leave employees with less protection than they had prior to electing a collective bargaining representative, should be made with correspondingly proportionate incentives for the union to agree to such sweeping waivers of its statutory right to employee representation. Id. As a result, in a number of cases, the Board has held that a proposal that vested exclusive control in the employer on the setting of wages, while offering little more than the status quo in return, was significant evidence of an intent to frustrate agreement, and in conjunction with other indicia of bad faith, violated of Section 8(a)(5) of the Act. *A-1 King Size Sandwiches*, 265 NLRB at 858–859; *John Ascuaga's Nugget*, 298 NLRB 524, 527 (1990), enfd. in pertinent part 968 F.2d 991 (9th Cir. 1992); *Harrah's Marina & Casino*, 296 NLRB 1116, 1133 (1989); *Alba-Waldensian, Inc.*, 167 NLRB 695, 696 (1967), enfd. 404

F.2d 1370 (4th Cir. 1968); *Tex-Tan Welhausen Co.*, 172 NLRB 851, 879–80 (1968), enfd. 419 F.2d 1265 (5th Cir. 1969), vacated and remanded 397 U.S. 819 (1970), Board Order enfd. in pertinent part 434 F.2d 405 (5th Cir. 1970), cert. denied 402 U.S. 973 (1971).

In accord with the cases cited above, we find the following factors establish that the Group entered into bargaining with no real intent to reach a collective-bargaining agreement:

> The Group's final proposal vested in its member-employers exclusive control over the critical subject of wages and eliminated entirely the Union's role in negotiating wages for unit employees, thus precluding bargaining on the most important issue in negotiations and eviscerating the Union's representational function. Indeed, the Group's wage proposal in this case is comparable to wage proposals in other cases which the Board has held to constitute evidence of bad faith bargaining. *See, e.g., Harrah's Marina,* 296 NLRB at 1130–1133 (employer's wage proposal contained no minimum or maximum rates, set no criteria upon which wages would be based, and removed wage disputes from grievance-arbitration procedures); *Alba-Wal-densian, Inc.*, 167 NLRB at 696 (employer's wage proposal granted the employer the right to cut wages unilaterally if it so desired).
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> The Group's final proposal foreclosed any possibility that a unit member could contest either the means by which wages were set, or the actual wages themselves, because it removed the subject of wages from the contract's grievance and arbitration procedures altogether and barred strikes over all subjects, including wages.
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> The Group's final proposal deleted article 12, which prohibited supervisors from performing unit work, and eliminated article 3, which prohibited "house accounts," thereby permitting the employer to make direct sales to outlet and other stores without involving the sales representatives or paying them commissions. These proposals had the effect of granting the employers unrestrained license to transfer sales accounts away from unit employees and effectively dissipate unit work.
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> The Group's final proposal deleted article 10.02, which required employers to replace unit employees' reassigned accounts with accounts of substantially equal volume, further permitting unilateral reduction of employee compensation without restriction.
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> Despite repeated requests from the Union for information and explanation about how the wage proposal would work, the Group stubbornly refused to offer any details, saying only that it needed "flexibility" in it operations. The Board has held that a significant manifestation of bad-faith bargaining is a refusal to offer explanations for one's bargaining proposals beyond conclusory statements that "this is what the party wants," or needs, as in this case. *Alba Waldensian*, 167 NLRB at 696 (respondent made no attempt to explain its proposal but merely asserted that wages and seniority were a matter for management alone to decide); *Summa Health System, Inc.*, 330 NLRB [1379] (2000) (respondent failed "to provide any specific economic justification for the absolute discretionary powers it demanded which lessened protections for bargaining unit work, other than generalized insistence on some vague concept of 'flexibility[.]'")

Taking these factors together, we conclude that the Group's final offer was extreme in nature, was made without any corresponding incentives to secure the Union's assent, and evidences that the Group was not negotiating in good faith with a view to trying to reach or complete agreement with the Union. The Group's proposal has the effect of granting its members exclusive and unilateral control over wages, thus permitting employers to set wages based on any criteria, or no criteria at all, without affording the Union or the unit members the opportunity to question or challenge such determinations.[2] The proposal also permits further dissipation of unit work and employee earnings by allowing supervisors to perform unit work and by allowing employers to remove sales accounts without replacing lost accounts with similarly valued ones. The proposal strikes at the core of the sales representatives' most significant interests—wages and volume of accounts—and severely diminishes any role played by the Union with respect to those interests. Finally, throughout negotiations, despite repeated pleas from the Union for explanations of the

[2] Our dissenting colleague suggests that because the Respondent's proposal includes a 1-year transitional salary (of the lesser of 75 percent of the sales representative's prior year's commissions or $50,000) and a $25,000 guaranteed minimum salary thereafter, the Respondent has imposed some significant limitation on its own authority to set wages. We find this contention to be unconvincing. As the judge found, the "Respondent's transitional offer limiting commission losses to 25 percent for 1 year as well as its offer of a $25,000 minimum, where average commissions are double that figure, can hardly be deemed serious compensating proposals." Given this significant gap between the earnings histories of unit employees and the proposed minimum salary guarantee, the Respondent has still retained a wide measure of discretion over wages. Therefore, we cannot agree that the inclusion in the proposal of a salary guarantee constitutes any meaningful limitation on the unilateral right to set compensation "in accordance with the wage and salary programs put into effect by the Employer."

wage proposal, the Group adamantly refused to engage in reasoned discussion of its proposal and refused to provide information that would support its demands. Accordingly, under all of the circumstances, we agree with the judge that the Group's final offer was intended to frustrate agreement with the Union, and thus constituted bad-faith bargaining in violation of Section 8(a)(5) of the Act.

The court's decision in *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000), is distinguishable. In that case, the court, inter alia, reversed the Board's finding that the company violated Section 8(a)(5) by implementing its merit pay proposal. The Board had held that the merit pay proposal was similar to the proposal addressed in *McClatchy Newspapers,* 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), in which the Board held that the respondent's merit pay proposal involved so much discretion over the timing and criteria for the setting of merit pay raises that the respondent would not be allowed to implement its proposal after impasse. The court in *Detroit Typographical Union No. 18* held that the respondent's proposal involved less discretion than the proposal addressed in *McClatchy*, and thus the Board erred in applying the *McClatchy* holding to the facts of that case. *Detroit Typographical Union No.18*, supra at 118. Here, we are finding that the Respondent bargained in bad faith based in part on its wage proposal, but our unfair labor practice determination is not premised on the implementation of a proposal concerning wages.

The court also reversed the Board's finding that the respondent Detroit News had bargained in bad faith, a finding that the Board based in part on its conclusion that the News "had repeatedly obfuscated and withheld details about its merit pay proposal, which details were relevant and necessary to the Guild's understanding of the proposal and to the formulation of a bargaining response." *Detroit Newspapers Inc.*, 326 NLRB 700 (1998), quoted in *Detroit Typographical Union No. 18 v. NLRB*, supra, 216 F.3d at 119. The court held that the information requested by the unions concerning this proposal was in reality designed to narrow the range of discretion which the News proposed to retain, and not simply to elicit further explanation or justification for its proposal. Id. at 119. The court stressed that the *Detroit Typographical Union No. 18* proposal provided more details than the McClatchy proposal in that it afforded some guidance as to the amounts of the merit pay raises that would be awarded. It also provided that merit raises would be awarded on fixed dates according to a detailed performance appraisal system, and, significantly, it allowed employees to challenge their merit raises in the grievance procedure. Id. at 118.

By contrast, in this case, we base our finding of bad-faith bargaining on a combination of factors which together show that the total discretion sought by the Group reflected a true intent not to reach an agreement with the Union. One of these factors was the Group's refusal to provide the Union with information or an explanation for its compensation proposal. The Group also proposed to retain almost total discretion over how it would set compensation (not merely merit pay as in *Detroit Typographical Union No. 18*) for each sales representative, and to deny the sales representatives any recourse to the grievance procedure to challenge their compensation system. Thus, the discretion sought by the Group in this case was far greater than that sought by the respondents in either *McClatchy* or *Detroit News*, and the Union in this case sought an explanation from the Group for why it needed such discretion, and was not simply trying to narrow the range of discretion sought by the Group in its compensation proposals. In short, our bad-faith bargaining findings here are independent of any *McClatchy* or *Detroit News* analysis.

2. The alleged 8(a)(3) violation by Respondent Royal

The judge dismissed the complaint allegation that Respondent Royal violated Section 8(a)(3) by removing various accounts from sales representative Edward Primavera. The judge found that Royal removed the accounts for legitimate business reasons, and no party excepts to this finding. The judge went on to find, however, that Royal violated Section 8(a)(3) by failing to replace the removed accounts with accounts of substantially equal volume, which, according to the judge, Royal's expired contract with the Union required.

The complaint did not, however, allege that the failure to replace the removed accounts violated the Act. During the hearing, the judge ruled that the General Counsel could obtain a make-whole remedy for a removal of accounts violation only by showing that Primavera suffered a loss in commission earnings, i.e., the sales volume of his newly assigned accounts was less than the sales volume of his removed accounts. The parties' litigation of the replacement of accounts issue was limited to addressing the judge's request for data that would assist in determining a make-whole remedy. The General Counsel did not attempt to amend the complaint, nor seek to prove that Royal's replacement of accounts was discriminatory. Following the hearing, the General Counsel did not claim in his brief to the judge that the failure to replace the removed accounts violated the Act.

It is well established that a violation of the Act cannot be properly found where the violation was not alleged in the complaint and the issue was not fully litigated at the hearing. *Bouley, Inc.*, 306 NLRB 385, 386–387 (1992).

Here, the replacement-of-accounts issue was not alleged or fully litigated. Accordingly, we shall reverse the judge's unfair labor practice finding and make the appropriate modifications to the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Liquor Industry Bargaining Group, its officers, agents, successors, and assigns, and the Respondents Fedway Associates, Kearney, New Jersey, Royal Division of R&R Marketing, L.L.C., Trenton, New Jersey, and the Jaydor Corporation, Milburn, New Jersey, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Delete section C of the administrative law judge's Order and Appendix C.

IT IS FURTHER ORDERED that paragraphs 21, 22, and 35 of the complaint are dismissed.

MEMBER HURTGEN, dissenting.

My colleagues conclude that Respondent has engaged in bad-faith bargaining. However, they do not premise this conclusion on any finding that Respondent was trying to avoid reaching a contract. Rather, they rely principally on their dislike of Respondent's proposals. That is, my colleagues do not cite any evidence of foot-dragging, dilatoriness, closed-mindedness, lack of information, etc. Rather, they cite the substantive proposals made by Respondent.

I recognize that those proposals vested substantial control in Respondent. However, the Supreme Court has held that such proposals do not establish bad-faith bargaining.[1] In addition, the fact that the unilateral control is in the area of employee compensation does not show bad-faith bargaining. In the *McClatchy Newspapers*, 321 NLRB 1386 (1996), line of cases, the employer's insistence upon substantial unilateral control over wages is *not* held to be bad-faith bargaining. Rather, the post-impasse unilateral implementation is the conduct that is held to be unlawful.

Moreover, the Respondent's position here did not give Respondent unilateral control over wages, and it did not exclude the Union. For the first year, the wages would be fixed by the union contract. In the other 2 years, there would be minimum guaranteed salary. My colleagues find fault in this offer of Respondent because, they say, it would substantially reduce prior earnings. In their view, it "can hardly be deemed a serious compensating proposal." However, the Board is not in the business of evaluating the substantive worth or fairness of proposals. That is to be left to the bargaining process.

Concededly, the Respondent retained discretion as to how compensation beyond that would be set. However, Respondent's proposal said that, prior to implementation, Respondent would provide each employee *and the Union upon request,* with a written explanation of the compensation applicable to that employee. This would include "timing, criteria, and procedures" for determining compensation.

My colleagues also point to other matters to establish bad-faith bargaining, but, again, these are simply substantive proposals which my colleagues do not like. Under the prior contract, there were certain contractual guarantees relating to the replacement of reassigned accounts, to supervisory performance of unit work, and to "house accounts." In the instant bargaining, Respondent sought to delete these guarantees. However, there is no statutory requirement that contractual guarantees must be maintained in subsequent contracts.

My colleagues cite cases in which the Board considered substantive proposals and found bad-faith bargaining. However, in those cases, there were other indicia of bad-faith bargaining not present here. The Board found the violation based on all of these indicia.

Hydrotherm, *Inc*., 302 NLRB 990 (1991), cited by my colleagues, is clearly distinguishable. In that case, the employer offered the union a contract which gave the union less than it would have had without a contract. In the instant case, Respondent has not done that. For example, there are contractual wages for the first year and a contractual minimum after that.

Finally, my colleagues decry the absence of information and explanation. However, there is no allegation or finding that Respondent has withheld relevant requested information. As to an explanation, Respondent explained that it desired flexibility with respect to wages. My colleagues simply do not like the explanation.

Stephen J. Holroyd, Esq., for the General Counsel.
Jedd Mendelson, Ilene F. Lainer, and *Kimberly Mundell, Esqs. (Grotta, Glassman & Hoffman),* of New York, New York, for the Respondents.
Howard A. Goldberger and *Edward Cohen, Esqs. (Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano),* of Kenilworth, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was tried before me in Newark, New Jersey, on May 9, 10, 15 ,and 16, June 20 and 21, July 17, and August 15, 1996. The consolidated complaint alleges that the Liquor Industry Bargaining Group (the Group or the Association), during negotia-

[1] *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

tions for a successor labor agreement with the Charging Party, Local 19D, Wine and Liquor Salesmen of New Jersey, United Food and Commercial Workers, AFL–CIO (Local 19 or the Union), by its overall conduct, including an insistence to impasse on a wage proposal by which it sought total unilateral control over wages of unit employees, has failed and refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act. The complaint also alleges that by acts of offering certain benefits and the implementation of the Association's withdrawals of certain other benefits, by individual members of the Association, including Respondents Fedway Associates, Royal Division of R & R Marketing, L.L.C., and the Jaydor Corporation (Fedway, Royal, and Jaydor) respectively, these individual Association members and Respondents, violated their bargaining obligations under Section 8(a)(1) and (5) of the Act. Finally, the complaint alleges that by removing certain sales accounts from its employee Edward Primavera, Respondent Royal discriminated against an employee in violation of Section 8(a)(1) and (3) of the Act.

By their first amended answer, Respondents denied the allegations of commission of unfair labor practices under the Act, and asserted numerous separate affirmative defenses which shall be considered, infra.

Posttrial briefs were filed by the counsel for the General Counsel, in which the Union joined, and by the Respondents. Each has been carefully considered.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Respondents Royal, Jaydor, and Fedway, each a corporation with an office and place of business, respectively, in Trenton, Milburn, and Kearny, New Jersey, have been engaged in the nonretail sale and distribution of alcoholic beverages. During the 12 months preceding issuance of the consolidated complaint, in conducting their business operations, they each have purchased and received at their respective New Jersey facilities, goods, valued in excess of $50,000 directly from points located outside the State of New Jersey. During the same period of time, the employer-members of the Association in conducting their business operations, collectively purchased and received at their New Jersey facilities goods valued in excess of $50,000 directly from points outside the State of New Jersey. Respondents admit, and I find that each of the individual Respondents, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondents admit that Respondent Association has been an organization composed of various employers engaged in the nonretail sale and distribution of alcoholic beverages, including, inter alia, Respondents Royal, Fedway, and Jaydor, one purpose of which is to represent its employer-members in negotiating collective-bargaining agreements with the Union. As such, Respondent also admits its status as an employer within the literal meaning of Section 2(2) of the Act.[1] I take this to mean that Respondents admit the Association's status as an agent of its members for the purpose of negotiating collective-bargaining agreements. In view of this admission, which is an adequate legal bases for determining the Respondent Association's status as an employer for the purpose of committing unfair labor practices under the Act, should liability be so determined herein, I find it unnecessary to rule on the further allegation in the complaint that the Respondent Association is an employer within the meaning of Section 2(6) and (7) of the Act, which Respondent has denied.[2]

The Respondents admit, and I find, that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Bargaining History and Early Negotiations for a Successor Agreement Leading to a Union Strike

The Union has had a lengthy-bargaining relationship going back many years with the Group on behalf of the salesmen employed by its members, including industry wholesalers Fedway, Royal, and Jaydor who have authorized it to bargaining on their behalf. The most recent collective-bargaining agreement between the parties ran from October 1, 1990, to September 30, 1993. That agreement contains a number of provisions relevant to the disputes subsequently arising in the negotiations for a successor agreement and which resulted in the Union's filing of the unfair labor practice charges herein.

In article III "House Accounts," the members of the Group agree they "shall not open, maintain or sell through any house accounts." The provision goes on to credit the salesman assigned for any sales made on an account by the covered employer's officers, members of the firm or any other means than through a salesman. If a new account is opened by a nonsalesman, the covered employer need not pay a salesman commission on sales for the first 30 days of the account, but must thereafter assign the account to a salesman who shall be given full credit. In a separate article XII, the Group agrees that sales on unsold accounts made by supervisors must be credited to a union salesman. In article IV, the Group dealing with discharge, grievance procedure and seniority, section 4:04 permits discharge for just cause of a salesman unable to earn $25,000 in commissions over the previous consecutive 12 working months, and commencing in the last year of the agreement on October 1, 1992.

Article VI, "Rate of Commission and Expenses," provides in section 6:01 for a commission rate of 5 percent on all sales with the exception of domestic still wines on which the rate shall be 5.4 percent. Substantially lower rates of commission are pro-

[1] Sec. 2(2), in pertinent part, defines the term "employer" to include "any person acting as an agent of an employer, directly or indirectly."

[2] The record contains no evidence that the Respondent Association employs any employees or that it independently engaged in any business operations other than its function in serving as its members' collective-bargaining representative in negotiating agreements. The Respondents deny, and I also conclude, that the Association does not represent its members in administering such agreements with the Union.

vided for sales on wine coolers and top deals offered monthly on a given brand. In article V "Arbitration," the parties agreed all unsettled disputes arising regarding the application or interpretation of any provisions of this Agreement shall be submitted to binding arbitration.

The Agreement also provided for a drawing account against commissions in the minimum amount of $100 weekly, with a lesser draw of $75 for the first 6 months of a salesman's employment. A trial period of 6 months is provided for newly hired salesmen, which may be extended by 3 months on the Union's agreement.

A separate article XVIII dealing with Casino Sales, requires the Employer to pay a royalty of 2-1/2 percent on all future sales to casinos made by means other than through a union member, such royalty to be distributed in a manner to be decided on by mutual agreement of the respective Employer and the Union. All present salesmen selling to casinos shall continue to enjoy the benefits of the preexisting commission terms on specific casino accounts being serviced on the date of ratification.

Article X "Miscellaneous" contains in section 10:01 a "most favored nation" clause, permitting the Group to demand application of any more favorable agreement or provision contained in any labor agreement between the Union and any other employer, on 15 days' notice to the Union, provided any unsettled dispute between the parties shall be referred to binding arbitration. Section 10:02 gives the members of the Group the right to assign and reassign accounts based on sound business judgment, provided, however, that the salesmen so affected shall be assigned other accounts with substantially equal volume, and further provided that the Employer shall not exercise this right in an arbitrary, capricious or discriminatory manner.

Article XII "Supervisors" prohibited supervisors from performing the duties of union salesmen, but when, on occasion, soliciting business from unsold accounts, any accounts sold must be credited to a union salesman and commission paid to such salesman in accordance with article III, "House Accounts.''

In August 1993, the Union commenced negotiations with the Group for a successor agreement. The Group was represented by Jerold Glassman and Ilene Lainer, partners in the law firm of Grotta, Glassman & Hoffman, P.C., longtime legal counsel for the Group and each of its members. The Union was represented by Emil Verdoni, the Union's president, Leonard Richman, its secretary-treasurer, salesmen members of the Union's executive board and Howard Goldberger, partner in the law firm of Schneider, Goldberger, Cohen, Finn, Solomon, Leder, & Montalbano, P.C., longtime legal counsel to the Union. From time to time Edward Cohen, another partner, represented the Union in negotiations and on the record in this proceeding, in place of Goldberger.

These negotiations were not successful. In an offer, described as the "Industry Final Proposal," presented in person on October 1, 1993, the Group would delete the $25,000 minimum commission earning criteria in section 4:04 and replace it with a $600,000 sales volume criteria, the failure to meet which in a 12 month period permits discharge for good cause. The Group also proposed, inter alia, reducing the domestic still wine commission rate to 5.2 percent and to reduce the commission rate paid to sales representatives on new products sold to a club or warehouse account, by successive annual steps of 1.5, 2, and 2.5 percents. The proposal defined club or warehouse accounts as those which buy on a regional or centralized basis and include such stores as BJ's, Price Club, Cosco, Pace, Sams, and Walmart. The Group's October 1 proposal would have also increased monthly expense money, either $400, or $350, depending on seniority, by $25 to all eligible sales representatives. A further proposal increased contribution rates to the Union's welfare fund by $65, $10, and $10 in each of the 3 years of a new Agreement. Aside from a few other proposed changes, all other terms and conditions in the expired agreement would be renewed for a new 3-year term.

The reductions, particularly in the area of club and warehouse accounts, were unacceptable to the Union, the membership rejected the proposal unanimously, and they went on strike. The strike lasted only from October 3 to 19. By its end, many salesmen had crossed the picket line and returned to work, as the Group members continued to operate by assigning salesmen's accounts to salesmen who had either refused to strike or had earlier crossed the picket line.

B. Group's Final Offer, Alleged Impasse and Implementation of Individual Terms by Certain Members

The salesmen now continued to work under the terms of the expired agreement as negotiations resumed with the same representatives in attendance, except that Edward Cohen, replaced Union Attorney Goldberger. Tentative agreements were reached on individual terms, such as vacation dates, increased employer contributions to the health and welfare plan and an increase on the minimum earnings required to remain as a salesperson, but no final agreement was reached.

Then on March 24, 1994, the Group submitted a final offer, a proposal containing full terms to run from whenever the agreement was reached in 1994 until December 31, 1996. In place of section 6:01 in the expired agreement dealing with commission rates, the final offer, in relevant part, provided as follows:

> 6.01 a) Sales Representatives shall be compensated in accordance with the wage and salary programs put into effect by the Employer, except that no Sales Representative with three years or more service with the Employer shall be paid less than $25,000 per year.

The Employer will provide the sales representative, prior to implementation and the Union upon request, with a written explanation of the wage and salary compensation program applicable to that sales representative. Notwithstanding any provision in this Agreement to the contrary, the terms of the written compensation program shall not be subject to the grievance and arbitration procedure. However, the issue of whether a sales representative was paid in accordance with the terms of the written compensation program may be submitted to the grievance and arbitration procedure.

In section 6:02 the Group provided a transitional benefit during the first year of this agreement, guaranteeing each sales representative at least 75 percent of his 1993 calendar year commission earnings or $50,000, whichever is less.

Another major change from the expired agreement in the area of compensation involved house accounts. While prohibited under the expired and earlier agreements, the Group now eliminated that prohibition, merely providing in the first sentence of a new article III "Accounts," that Accounts shall be serviced in accordance with the policies and procedures promulgated by the Employer, and, then noting, in a second sentence that compensation for servicing accounts to sales representatives shall be in accordance with section 6:01 of this Agreement. The Group also eliminated from section 10:02 of article X the provision requiring the Employer to assign to a salesman whose accounts had been removed, other accounts with substantially equal volume. Furthermore, article XII in the expired agreement was deleted. This provision, earlier noted, prohibited supervisors from performing saleman's duties or from receiving commissions on unsold accounts, which were to be credited to union salesman.

The Group's final offer also provided for an increase in monthly contributions per salesperson to the Union's welfare fund to $280, effective January 1, 1995, and $290, effective January 1, 1996.

Neither in face-to-face meetings preceding the final offer, nor in the final offer itself did the Group or any of its members, including Fedway, propose the institutions of a section 401(k) investment plan for its members.

Richman testified that he understood from the interchanges at the negotiation sessions leading up to the March 24 final offer that in establishing compensation the employer members of the Group would take each salesperson, separately, and inform him what he was worth, based upon the nature of his accounts, whether he sold to package stores, or to "white tablecloth" or "checkered tablecloth" restaurants, taverns, or bars. The salesperson would then be informed what he would receive in compensation, whether an hourly rate or a salary, or commission rate or a combination of these schemes. The Union was to be part of this process after the fact, by provision for its receipt, upon request, of a written explanation of the compensation program applicable to a particular salesperson.

At the bargaining table, the Union asked for specifics, exactly what each person was going to get, ahead of time, so it could negotiate the compensation program. But, according to Richman, and later admitted, the Group's negotiator Jerold Glassman kept repeating that the Group's members wanted flexibility, which meant complete flexibility in setting compensation and would not lock into specifics at the table.

On May 11 this final offer was presented to the Union membership—numbering some 670—with a recommendation to reject it. The union officers at this meeting presented the membership with a contract negotiation summary, which itemized the changes from present working conditions in the expired contract contained in the Group's final offer, most of which have been noted herein, supra. The union membership unanimously turned down the final offer.

By letter dated May 13, 1994, Ilene Lanier, on behalf of the Group, wrote to Verdoni and George Orlando, listed as Local One President, Wine Liquor & Distillery Workers' Union, but described by Richman as the International Union President, who had helped prepare the Union's contract negotiation summary. She first noted the Group's understanding that its March 24 proposal was rejected and then proceeded, "Since the Union has stated on numerous occasions, that it is unwilling to accept fundamental issues in the Employer's proposal, and the Employers are concerned about the financial conditions of the employees' health fund, the March 24th offer will be implemented effective June 1, 1994, except for the following provisions: article II - Union Security, article V - Arbitration, article IX Union Dues, article XI - No Strike, No Lock-Out and article XVI - Effective and Termination Dates of Agreement." The letter went on to propose that the parties agree to abide by four provisions, substantively the same as included in the expired agreement, naming union security, arbitration, union dues and no-strike, no lock-out, such an agreement to continue for 90 days, and which could be canceled by either party on 90-days notice. A side letter was enclosed to memorialize such an agreement.

By responsive letter dated May 17, 1994, Edward Cohen informed Lanier that in order for the Union and its members to meet and intelligently discuss and evaluate her letter and proposal the Union must know exactly what compensation is to be implemented for each and every unit salesperson as of June 1, 1994, by each Employer and how such level of actual compensation has been determined for each such unit employee. Cohen reminded Lanier that the only specific compensation proposals the Group had made were minimum percentages and not actual compensation to be paid. Cohen asserted time was of the essence as implementation was set for 2 weeks hence and the Union was to schedule a membership meeting as soon as possible.

By letter dated May 23, 1994, and forwarded by Federal Express, Glassman first advised Cohen they were in receipt of his May 17 letter and then wrote: "Prior to implementing any changes in the Sales Representatives' compensation structure pursuant to article 6 of the employer's March 24, 1994 proposal, we will advice the Union as to the timing, criteria and procedures for determining and paying such compensation." Glassman closed by noting that the described information will be provided to Cohen in a timely manner.

Richman testified that on advise of counsel the Union rejected the side letter agreement to continue four provisions for 90 days.

Prior to Cohen receiving the May 23 letter, Richman was made aware by employees that they had received letters directed to them by Group members. One, a letter from Federal Wine & Liquor Company, a Division of Fedway, to its salespersons at their homes, signed by its President Richard Leventhal, and dated May 17, first referred to the Union's rejection of its proposal for a new agreement and its advice to the Union that Federal intended to implement certain provisions in that proposal effective June 1. The letter then noted no sales representative's compensation will be changed without prior notification, but that Federal will increase its contributions for their health benefits effective June 1. Leventhal then announced a meeting of employees to be held on June 2 to explain Federal's final offer and answer questions.

At the June 2 meeting, Leventhal announced the following: One, club accounts will become house accounts with the club accounts being assigned to management personnel, and royalties were being eliminated. Two, the company was interested in instituting a corporatewide 401(k) plan, effective January 1, 1995. However, with respect to Local 19 unit employees, the company was awaiting the Union's response regarding this. (By letter dated June 2, addressed to Richman, Neil Barnett, general manager of four wine divisions of Fedway, including Federal, advised that these divisions intended to institute a 401(k) plan effective January 1, 1995, available to each sales representative.) Three, compensation would remain the same for Local 19 sales representatives until the Company and Union discussed timing, criteria, and procedures for determining and paying changes on compensation. Four, the health insurance contribution rate was increased effective June 1, 1994, from $215 per month for each eligible employee to $280.

Richman described the club accounts as relatively new warehouse style outlets which came into New Jersey. Other testimony establishes them as multistate, even national chains. Retail customers must purchase memberships to purchase there and these outlets sell liquor at great discounts. Names of these chain clubs have previously been mentioned. Richman also described a royalty pool which was established when the first came into Atlantic City and an understanding was reached to limit to one the salesman servicing multiple casino accounts but to create a pool of commissions on sales to casinos to be shared equally by salesmen thus displaced. Every quarter the resulting commissions were divided up among salespersons of Fedway, Jaydor, and Royal assigned to their southern divisions.

Aside from Fedway, both Jaydor and Royal ultimately implemented the proposal in the March final offer to remove club accounts and designate them as house accounts and to eliminate the royalty pool, thus eliminating commissions previously paid to salespersons on sales made to all these accounts. By letter dated October 11, 1995, Louis T. De Marino, senior vice president, sales & marketing of Jaydor wrote to Verdoni advising that effective November 10, 1995, 12 named salespersons will no longer be assigned the responsibility to service club accounts, instead reassigning this responsibility to its key account managers, which reassignment may result in the loss of income to a number of these named. Jaydor would attempt to assign other accounts to those impacted to lessen the loss of income. In the letter Jaydor then requested an early meeting to negotiate a transitional compensation system for the four sales representatives who will be most substantially effected. Previously, in January 1995, upon the death of a salesman named Nestor who had serviced the Price Club, Jaydor had, on the Union's inquiry, informed it after the fact that this account had become a house account. By responsive letter of October 12, 1995, Verdoni objected to the unilateral removal of club accounts from sales representatives and advised it was filing charges with the Board.

Richman testified that sometime in mid-1994, Royal removed the casino royalty commission sharing plan or pool from its sales persons. He learned this when members informed him they were no longer receiving their checks for the royalty plan.

According to Richman the Union had never bargained separately with individual employer members of the Group regarding wages or any other terms comprising a contract prior to the 1993–1994 round of negotiations. Neither had the Union ever sought individual contracts with any of these employers.

During his cross-examination, Richman confirmed that the Group exercised only a bargaining function on behalf of its members, and that during the life of the agreement the member companies administered the agreement as it affected their individual operations.

Richman also agreed that club accounts were a relatively new phenomenon, only becoming a significant presence in 1990 or 1991, and the 1993 negotiations being the first in which they became an issue. Some salesmen who had club accounts among their total accounts had total compensation exceeding $150,000 annually.

Richman also acknowledged that the Union initially agreed to meet with Jaydor to negotiate a transitional compensation plan for salesperson adversely affected by the removal of club accounts and their conversion into house accounts, but that on advise of union counsel the meeting was canceled. The Union would not bargain with an individual company over a change in compensation structure for individuals. Correspondence between Jaydor and the Union confirm this turn of events. On October 23, 1995, De Marino wrote Verdoni to reconsider his refusal to meet, and ended by proposing to provide affected sales representatives, who will continue to be paid at the current commission rates, a 1-year guaranteed 75 percent of their November 1, 1994, through October 31, 1995 commission or $50,000, whichever is less.

Richman also agreed that Fedway sought to bargain with the Union over transitional pay for two salespersons whose club accounts were changed to house accounts. The evidence shows that a meeting was held on June 6, 1994, between Lanier and Verdoni, at least, to discuss compensation for two salespersons, Scott Hutchinson and Jim Mosel, employed by a Fedway division, Gateway-Perrone, who had previously performed merchandising services (unloading goods, packing) as well as sales services on club accounts. At the meeting Lanier proposed compensating the two for continued merchandising activities on the club accounts Fedway had removed at the rate of 1-3/4 percent on all merchandise shipped for the remainder of 1994, 1-1/4 percent in 1995, and 3/4 percent in 1996. In subsequent contacts the Union sought additional information and requested a modification permitting these two salesperson to refuse to continue providing merchandising services.

In a June 16, 1994 letter, Lanier confirmed a Fedway/Union understanding providing 2, 1-1/2-, and 1-percents commission rates for 1994, 1995, and 1996, and that the two men could decline to continue merchandising efforts. The letter finally notes that Verdoni informed Lanier that Hutchinson resigned from employment, leaving only Mosel covered by the transitional scheme. Richman agreed that the Union did not respond in writing to Lanier's letter but Verdoni may have telephoned her.

Richman also agreed that during the terms of the 1990–1993 agreement as a result of a Fedway consolidation of its division, meetings took place with the Union over complaints involving reassignment of accounts raised by members. Richman considered these matters to be informal grievances arising under the contract which were sufficiently satisfactorily resolved.

Richman also acknowledged that during negotiations in 1993 and 1994, the Group indicated that certain club accounts had advised they no longer wished sales representatives to continue to call upon or visit them. Among union members on the bargaining committee were persons who had opened, serviced, and sold those club accounts.

Richman now was asked about meetings which took place between the Union and Fedway and other Group members, individually, in June and/or July 1995. Richman testified that at the urging of Lanier and Glassman, after Glassman told Verdoni he couldn't get his Group together on compensation, Verdoni agreed to meet, individually, and did meet Group members to seek to arrive at individual compensation packages, which, coupled with a master contract for work rules, would resolve the collective-bargaining differences outstanding between the Union and the Group and result in an overall master agreement with individual compensation riders. In two letters Respondent introduced in evidence, Union Counsel Goldberger on June 26 and Union President Verdoni on July 12, respectively, sought to assure Lanier that the informal discussions the Union held with Fedway and Jaydor should not be deemed as changing in any way the status of each employer as a part of the multiemployer bargaining unit. While the Union was willing to try to seek a master agreement and compensation riders with Group members, it remained adamant in opposition to the Group's attempt, expressed in section 6:01 of article XI of the March 1994 final offer "to bargain individually with each sales representative not the Union" (Richman at Tr. 449). In two letters to Lanier, on August 3 and 11, 1995, Union Attorney Cohen made clear the Union's rejection of a belated and untimely withdrawal from association bargaining of the individual employers, and its unwillingness to negotiate on a single employer basis.

Richman conceded that in an effort made at the urging of and under the instructions of Glassman the Union did meet with all of the employers separately, but that in spite of Leventhal's effort, on behalf of Fedway to negotiate a contract in its entirety, the Union declined to continue meetings on such a basis. As Richman noted, when they met with each employer they wanted a contract from A to Z and the Union wasn't willing to do that. [3] Richman also conceded that the Union left with each employer member at the conclusion of their meetings a multipage proposal, excluding compensation, which was not discussed at the meetings, but which contained terms and conditions which the Union was prepared to accept in a master contract with the Group if individual compensation packages could be arrived at.

Richman also acknowledged that during their bargaining relationship each of the member company's from time to time put into effect separate incentive and bonus programs for its sales representatives not covered by the labor agreement.

With respect to the Fedway decision to implement a 401(k) plan effective January 1, 1995, although Federal Wine & Liquor Company, one of the implementing Fedway divisions, wrote Verdoni confirming an offer to meet and to discuss the plan and enclosing a summary planned description, the Union refused to meet with Fedway to discuss the 401(k) plan.

During Richman's cross-examination, and after, in their own presentation, Respondents sought to establish that the Union knowingly permitted house accounts, i.e., liquor sales by owners or management on accounts for which no unit salesmen received commission.[4] By establishing the existence of such accounts by employers not members of the Group, Respondent argues that its removal of the prohibition against house accounts in its final offer and its implementation of that removal by its members was permitted by the most favored nation article of the expired Group agreement and thus, was not an unlawful unilateral change as alleged in the complaint. The legal principles involved and their application to the facts will be discussed, infra. Although expressing serious reservations about this defense, I did permit a limited development of the facts relating to it as disclosed in the following summary of Richman's testimony.

Richman denied that there were distributors outside the Group with whom the Union had bargaining relationships that have over the years had house accounts. Respondent counsel then asked specifically about an alleged warehouse manager named Richard Bronstein who sold for F & A Distributing Company and received sales commissions, an owner of a company called Goldstar, Arnold Goldberg, who sold liquor and received commissions, and a manager of American B & D, Tom Dirigibus, who placed orders on its behalf. Richman initially denied knowledge of either the status of these individuals or their sales, except for acknowledging that Bronstein did receive commissions.

Richman did confirm that during negotiations, Verdoni did say that the Union would not give up that article prohibiting house accounts. He further confirmed that the strike was called as a direct result of two October 1 prestrike Group offers, one, the steep proposed reduction in commission rates on club and warehouse accounts and the other the inadequate increase in contributions to the health and welfare fund in light of the fund's precarious financial position. As to club accounts and casino royalty pools, these accounts generated substantial sales in the many millions of dollars, thus providing under the 1990–1993 agreement substantial commission income to the salespersons in the unit. Their steep reduction prestrike, and their removal entirely from the Group's poststrike offer, and later, by

[3] Richman's version of the position taken by Fedway at their meetings is corroborated by a memorandum circulated for signing by Leventhal at their second meeting, erroneausly described as an "attendance sheet," which recites that "Fedway Associates and Local 19 agree that Fedway's affiliated companies . . . are no longer members of the multiemployer bargaining unit." The following people acknowledge that "they met on July 7, 1995 in order to negotiate for an individual collective-bargaining agreement between Fedway's affiliated companies . . . and Local 19." The union representatives repudiated this document. Richman's version of the meetings, in particular the attempt by Fedway, among other member companies, to negotiate a separate complete agreement, and the Union's rejection of the ploy, is credited.

[4] Richman later defined a house account as one in which someone in management is selling and there is no commission paid and the company is keeping that commission. The General Counsel then noted that by virtue of the receipt of the commission by a manager, director, or owner, the company is able to defray other salary which might otherwise be paid to that person, if the manager foregoes the commission due on a sale, this is also a benefit to the company.

action of individual Group members, coupled with the elimination of the prior requirement of providing accounts of equal volume to the ones removed, resulted in a substantial loss of income by affected sales representatives. Respondent's transitional compensation proposal to ameliorate these losses was to be of short duration, and, further, the retention of a merchandising function only affected very few salespersons and provided a far lower commission rate than previously enjoyed.

The adverse impact on salespersons of the withdrawal of the language protecting their income level by requiring compensation with accounts of equal volume on the reassignment of accounts was graphically presented by Richman. When coupled with the new March 1994 proposal giving the Respondent the authority to set compensation for each salesperson and to implement the compensation scheme without Union input but only an explanation, upon its request, and without being able to dispute the setting of compensation through binding arbitration, the Respondent's proposal was viewed by Richman as eliminating the Union as a participant in the bargaining process to the extent of making its role meaningless.

As for the Union agreeing to the percentage commission rates for Fedway employee Mosel for performing merchandising work as recounted in Lainer's June 16, 1994 letter to Verdoni, Richman disputed that these rates were fixed by agreement with the Union and he is credited. It does appear, that at its meeting with Lanier the Union did seek a higher rate than originally offered by Fedway as well as the right of the affected employees to decline the merchandising work. And the terms in the letter probably resulted from the talks at the June 6 meeting. Thus, Lanier's recital of the final terms probably reflects the best terms the Union could secure, but not an agreement which the Union was prepared to acknowledge, leaving the acceptance of the terms of the offer up to the remaining employee, Mosel, to whom they would apply.

During a redirect examination Richman explained that Goldstar had been an independent company until roughly 10 years ago, when it was purchased by Royal, apparently ceased operations under its original name and became part of the Group. Richard Bronstein, who died about 3 years ago, had helped out in F & A's warehouse. Richman now acknowledged that Tom Dirigibus, was a salesperson and member of the Union who was later placed in management of American B & D, as brother-in-law of the owners. But, Richman explained, the commissions generated by Dirigibus' sales in the period 1990–1993 were put into a pool to be shared by the unit salespersons under a side letter and in the current successor agreement it was written into the agreement as a royalty pool arrangement.

Richman also explained that it is the salesman, not members of management, who visit accounts on a regular basis, thereby encouraging and generating sales. Salesmen have also incurred extra expenses in cultivating club accounts, by visiting out-of-state offices, which probably exceeded their $400 monthly expense allowances under the expired agreement, and engaged in review of industry publications and newspapers and soliciting their contacts in locating and selling new or transferred accounts. Richman later noted that the club accounts taken away from Mosel and another Fedway salesperson, Marilyn Rheingold, accounted for half of their compensation, which prior to the changes in their assignments, exceeded $150,000 a year each. The parties agreed that the average sales representative earns approximately $45,000 to $50,000 a year.

During further redirect examination, Richman explained that when Jaydor and Fedway converted certain club accounts into house accounts and the Union raised objections to these actions, the employers never offered to submit the dispute to binding arbitration under section 10:01 of article X "Miscellaneous" of the expired agreement or last offer, which provides for unresolved disputes arising with respect to an employer claim that it is entitled to more favorable treatment under another labor agreement with respect to creation of house accounts to be submitted to binding arbitration. Neither did the employer members of the Group invoke the most favored nation article as a basis for its elimination of the prohibition in its final offer or in the individual employer implementations made the following year.

In its defense to the alleged bargaining allegations, Neil Barnett, general manager of Fedway, testified that when the negotiations for a successor agreement got underway in mid-1993, the Group explained to the Union that the changing nature of the industry and the continued decrease in consumption, adversely affected the Group's proposed terms for renewal. As a consequence of the growth in national buying clubs and chains, the managements of the Group members were required to deal directly with their centralized buying offices on an expedited basis, which resulted in incurring significant extra costs in servicing arising from the odd times of deliveries, special packaging requirements and related factors. These clubs and chains also increasingly sought the exclusion of salespersons from the sales process.

Even before bargaining commenced, following meetings held among the members to prepare their bargaining demands and goals, one member, F & A Distributing Company (the company which had employed Richard Bronstein) which had historically been a member of the Group, withdrew from the Group, asserting it had no interest in changes in compensation. Another member, Baxter (the Baxter Group, Inc. and its divisions) did not unilaterally implement any terms of the Group's final offer other than the monthly increases in health insurance contributions. Within 6 months of the hearing, Baxter and F & A had merged into a new entity known as Allied Beverage. Baxter is not alleged as a Respondent. Two other members, Reitman Industries and Royal Distributors & Importers and their respective divisions ultimately merged to form R & R Marketing L.L.C., the Royal division of which is one of the individual alleged Respondents in this case.

Barnett noted that various incentives, such as bonuses, trips and prizes, offered by Group members, which differed company to company, in excess of the commission rates were not covered in the labor agreement. Such incentives comprised 10 to 20 percent of total compensation. On sales of brands sold at lower prices by other, nonunion employer competitors, the Union had agreed, approximately 6 years ago, to reduce the commission rate to no lower than 2 percent. This is the rate applicable to "top deal" sales contained in section 6:01 of article VI of the expired agreement. Group members also made arrangements in individual cases to continue new hires on salary well beyond the probationary period to subsidize them while they built their sales territory. These matters as well as extensions of probation are normally discussed with the Union.

Respondent sought to demonstrate individual bargaining between Fedway and the Union when an agreement was reached between them in the early 1980's regarding the manner of distribution of the royalty pool generated from sales to s. Again, in 1992, when Fedway consolidated from five sales divisions to three, discussions were held with the Union without incident regarding the reassignment of merged accounts. But Barnett later agreed that both of these instances involved issues that arose during the life of the contract and that the Union never negotiated a contract individually with Fedway. Indeed, negotiations relating to the division of the casino royalty pool was specifically provided for in article XVIII of the expired agreement.

The 401(k) plan which Fedway implemented in January 1995, for all employees, was under consideration for a number of years before a decision was finally made to offer it. Barnett did not testify that the matter was ever raised by the Group during bargaining for a successor agreement. It was only on June 2, 1994, that the Union was first notified by Fedway and no response was ever received. Even when eight or so employees requested Fedway to institute a 401(k) plan, still the Union was not informed. Yet, when the decision was made to implement the 401(k) plan the Union was notified. Barnett agreed that the greater the employee participation the more likely the plan would be approved by the Internal Revenue Service under its rules pertaining to the qualification of the program. Of 500 odd employees, Fedway employed 200 salespersons. So, salesperson participation was important to the company. Barnett also later testified under Union cross-examination, after being recalled by Respondent, that, just as with respect to the Fedway 401(k) plan, to his recollection neither Fedway nor Glassman, during the 1993–1994 negotiations, had ever proposed a merchandising bonus for salespersons whose commissions from club accounts were being reduced and then eliminated by the March 1994 final proposal.

Contrary to Richman's testimony, and the union position expressed in its counsel's letters, Barnett claimed that in late June or early July 1995, Verdoni telephoned him to say he wanted to meet with Fedway to see if they could come to an agreement, without indicating any specific limitations on the format. Barnett attributed comments to a Union Executive Board Member Frank DiLorenzo and President Verdoni made at a July 7 meeting expressing a willingness to negotiate a full agreement. Yet Barnett also corroborates Richman that after Leventhal of Fedway passed around the sheet committing the Union to bargain individually with Fedway outside the multi-bargaining Group, the tone of the meeting changed and the Union rejected individual across-the-board bargaining, although it took a telephone call to union counsel to have the Union confirm this change. At a second meeting on July 11, the union representatives were accompanied by Counsel Goldberger who, although expressing a willingness to explore issues, raised the Union's objection to the nature of the bargaining Fedway was seeking which was shortly confirmed in writing by the Union's president and counsel. Whether or not the union agents initially went along with a with a format permitting wide ranging discussions on all issues, and I doubt this is so, given the prompt Union withdrawal on receiving Leventhal's typed form of agreement, it is clear that the discussions broke down over a basic disagreement as to format and a union misapprehension of Fedway's intentions, which, after all, exceeded the parameters of compensation negotiations described by Glassman in his initial talk with Verdoni. The fact that the Union provided a form agreement at the July 7 meeting, excluding names of employers and a compensation article, corroborates my finding, and is in accord with the Union's interest in expediting an overall master agreement with the Group once individual compensation riders were concluded.

Barnett confirmed that club accounts were converted into house accounts after June 1, 1994, with salesmen no longer receiving commissions from sales made to them. During the period from June 1994 to March 1996, sales to these now converted house accounts totaled $10–15 million. Thus, Fedway saved approximately $700,000 in commissions previously paid to salespersons at rates of $5 or 5.4 percent of sales. No replacement accounts were offered to salespersons losing club accounts; under the implemented agreement, both the prohibition against house accounts and the requirement of compensating sales representatives from whom accounts were removed with accounts of substantially equal volume, were removed. Further, in spite of the claims made in bargaining as to the major business concerns facing the wholesale liquor industry, Barnett did agree that Fedway has continued to be one the leaders, nationwide, in wholesale sales of alcoholic beverages, ranking 14 or 15 overall. But Barnett also testified that overall the market is shrinking.

During his redirect testimony Barnett was asked for the first time by Respondent counsel about discussions at the bargaining table before the strike dealing, in particular, with house accounts. Barnett testified that there were numerous discussions, during which management reiterated the need to service the club accounts in a different fashion. At one point, in September 1993, the Group proposed that no commission shall be owed for sales made to a national account. National accounts were defined as multistate operations which buy on a regional or centralized basis. In addition, management referred to there being house accounts effective in certain companies that put certain other companies at a competitive disadvantage. At one meeting in the mediator's office, near the end of the negotiations prior to the strike, Verdoni made a comment that you are not taking any accounts away from my men, you are not getting any house accounts. Barnett failed to specify in the meetings which nonGroup member wholesalers were being alleged to be maintaining house accounts, what the nature of the house accounts were and whether it was claimed that the Union was aware of the practice. Both Richman and Verdoni testified that it was exceedingly difficult to establish the presence of house accounts at a particular employer and that suspicion did not equate with actual evidence that such sales were being made in which commissions were not being paid to salespersons. Respondent did not dispute that union contracts with non-Group employers would have contained the prohibition against the opening, maintaining or selling through house accounts set forth in article III of the expired agreement.

While no names were mentioned in the bargaining meetings, Barnett did assert at the hearing that Bronstein, although a member of Local 19, was also the warehouse manager at F & A and had some of the largest accounts in the State assigned to him. The period during which this was alleged to have occurred was while F & A was a Group member to whom the most favored nation clause would not be applicable, Bronstein having died on August 11, 1993. While Barnett also claimed that F & A left the Group because of satisfaction with a compensation system which included operating house accounts through Bronstein, there was no mention of F & A at the bargaining table. If it had, the Union would surely have disputed Bronstein's receipt of commissions as house accounts, as it did during the hearing, based on Bronstein's longtime membership in the Union, his sole reliance on commissions for his renumeration from F & A, the lack of any formal managerial title or function and the fact that even if he was acting as a warehouse manager he was not overseeing salespersons or selling accounts from which salespersons had been removed.

A Respondent witness, Louis De Marino, senior vice-president of sales and marketing, for Jaydor for 16 years, confirmed that his company had never negotiated directly with the Union an entire collective-bargaining agreement. Furthermore, as alleged in the complaint, Jaydor ceased making payments to sales representatives of their shares under the royalty pool since the pool was first established between Jaydor President Michael Silverman and the Union.

As further evidence of the history of alleged direct bargaining between the Union and individual Group members, Jaydor's president, Michael Silverman, referred to a April 20, 1982 letter he wrote to Verdoni confirming their agreement on the means of disbursing the royalty, including eligibility, disbursement periods and formula. It is clear that this agreement was entered during the term of the Group/Union collective-bargaining agreement in effect at the time, when the Group was not functioning, it only being authorized to act during negotiations for new agreements. The expired 1990–1993 agreement contains an article XVIII memorializing the parties' understanding that if any member/employer decides to sell to casinos other than through a union member, it shall pay a royalty, to be distributed in a manner to be decided upon by mutual agreement of the parties. Even if not in existence in 1982, this provision recognized the legitimacy of the prior practice.

Silverman also referred to the time, in 1980, when Jaydor acquired a wine company, United Vitners, whose name it changed to International Vitners, and it agreed with the Union to compensate sales persons hired from United who had previously been represented by a different union, at a 5.7-percent rate, higher than the contractual commission rate. The December 2, 1981 letter from Silverman to the Union, refers to International as being a party to the multiemployer collective-bargaining agreement for the term of October 1, 1981, through September 30, 1984. As noted previously, at the time of this agreement, the Group had again dissolved.

Silverman corroborated earlier accounts of the position maintained by the Group as bargaining commenced in 1993. The Group spoke of a lengthy, multiyear decline in liquor and wine consumption, putting greater pressure on industry participants to increase productivity so that commission rates, generally, in particular on club and national accounts, would have more of a direct relationship to the sales effort and the actual work performed. The Group also stressed at the table the change in the nature of the industry, with small licensees, characterized as mom and pop licensees, being replaced by fewer and more powerful retail entities, both on and off premises. As to on premises sales, national retail restaurant chains had grown and expanded. As to off-premises sales, clubs were now a dominant force, as large retailers, either operating independently, or in retail buying cooperatives were leveraging their buying power, and advertising together. These changes also required a much more efficient, cost effective operation.

In this context the Group told the Union they were looking for a no-cost contract, one that balanced all elements in such a fashion that it was neutral in terms of its cost to the employers. Thus, when the Union urged an increase in contributions to the health plan of a substantial nature and also sought an increased expense allowance, the company countered that if these items were agreed to, cost savings would have to be found in other areas, such as in commission rates, or narrower segments of the market, such as house accounts. Yet, while Silverman spoke generally of establishing house accounts, and the Union strongly opposed them, the Group did not formally propose creating house accounts until its final offer following the strike, although it did propose severally reducing club account commission rates, progressively, extending the initial period following opening of a new account during which its members could retain the commission, and eliminating commissions on national accounts (in its September 29, 1993 written proposal).

After the strike, when the Group made its March 24, 1994 final proposal, and during meetings held thereafter to January 1995, Silverman described Group negotiator Glassman as explaining that the Group sought flexibility as to compensation. He noted that different types of accounts require specialized skills, product knowledge and the recognition of differences between selling off premises distilled spirits, fine wines, or on premises white table cloth (restaurant) accounts. These differences might lead to the creation of different classes of salespersons for purposes of compensation. Glassman also pointed out that there existed significant differences between the employer members of the Group regarding philosophy and strategy in how to approach the market place.

With respect to the later meetings held in June and July 1995, with the Union, Silverman maintained that Verdoni agreed to his request that Jaydor be released from its obligation to negotiate within the Group. I have already found that the Union never finally agreed to the withdrawal of Fedway or any other Group member, including Jaydor, from the Group, and whatever impression Group members may have initially received,any misunderstanding and ambiguity was finally dispelled, in the case of Jaydor, by Verdoni's July 12, 1995 letter to Lainer. Silverman did acknowledge that when Glassman suggested the members initiate meetings with the Union to seek individual compensation riders to a master agreement and he responded that Jaydor would prefer to bargain the whole thing out, Glassman told him to ask the Union.

In a 1-1/2 page typed communication to all sales representatives dated May 21, 1994, Silverman informed them that Jaydor along with the other employers, will formally implement certain terms and conditions of the Groups contract proposal, including increases in contributions to the health plan. "All of our options with respect to compensation, job duties, account assignments, as well as other conditions of employment will, from June 1 on, be in accordance with the terms set forth at length in the offer being implemented." As to compensation, Silverman noted that . . . "while the contract proposal being implemented gives us the right to formulate the compensation system for sales representatives . . .," it required a lot of study and consideration before taking any actions. The letter went on to insure that their employees' skills, special knowledge and experience would be respected and a fair plan arrived at which would recognize competitive realties and not induce them to leave. Near its end, Silverman assured the sales representatives that "should we decide on any specific changes that impact you, we will notify the union, and you, in advance." In cross-examination, Silverman agreed that in his May 21 letter to the unit employees, he did not say anything about negotiating with the Union with respect to a revised wage system.

During his cross-examination Silverman recognized that since no successor agreement had been reached with the Union, and the Union had ended up not providing permission for it to bargain individually, the member employers remained under a legal obligation to bargain as a group.

Jerold Glassman, Chairman of Grotta, Glassman & Hoffman, the law firm representing Respondents, and longstanding chief spokesman and consultant in bargaining for the Group, testified for Respondent that meetings with the Union commenced in early September 1993. The Group members took the position they were seeking to achieve more control over the assignment of accounts, job functions, productivity, and costs. The Union opposed any more givebacks, it wanted no more benefits reduced. Over the years, e.g., the Group had gotten the right to reassign accounts so long as equivalent accounts were provided, and to retain commissions on new or previously unsold accounts for 30 days, and requiring salespersons to perform display work.

Glassman expressed the Group view at early meetings that the commission should bear some relation to the effort it took to sell the product. The Group also wanted to address the growth in club and national accounts, the desires of some of these customers to deal directly without a salesperson, with personnel being increasingly used in packing functions as opposed to selling, and salespersons' receipt of large commissions in return for very little effort. The Group also wanted a freer hand in assigning and reassigning accounts. A particular stated objective of the Group was a cost neutral contract.

Up until the strike the Group continued to seek these objectives in their proposals, in particular, pushing hard for severely reduced and declining commissions on club accounts, reaching zero by the end of the next 3-year contract. As sweetners the Group offered increased expenses and higher health and welfare contributions.

Following the 3-to 3-1/2-week strike, the Group picked up on a union bottom line suggestion, and made a written proposal to the Union through the Federal and State mediators on October 18, 1993, which, inter alia, changed a $25,000 minimum commission earning criteria to remain a salesperson with a $575,000 minimum sales volume criteria, and changed the commission rate to 3-1/2-percent bottom line, and offered commissions on club and warehouse accounts of 3-1/2 percent down to 0 percent in the third year. The Union was not interested in this proposal because it cut earnings too far, but later, in mid-November expressed interest in going back to the Group's immediate prestrike or immediate poststrike proposal, with some changes, such as a sufficient increase in the contribution to the financially shaky health and welfare fund. Glassman told the Union the Group was no longer interested and the time had come to seek to control accounts including the method of renumeration of salesmen.

In a new November 22, 1993 proposal, again submitted to the Union through mediators, Glassman now sought, inter alia, the elimination of the prohibition on opening, maintaining or selling through any house accounts, require salesmen to perform stockboy, display and window trimming functions, and, as to article VI, "Rate of Commission and Expenses" section 6:01, negotiate a change to the entire clause, discussing a collectively bargained compensation scheme that fits the various sales and marketing operations of the Group, wherein types of sales, sales effort and productivity are determining factors.

By December 7, 1993, in another written proposal made to the Union through the mediators, Glassman now offered, inter alia, that section 3:01 of article III "House Accounts" shall be deleted and revised to provide that Accounts shall be serviced in accordance with the policies and procedures promulgated by the Employer and compensation for servicing accounts shall be in accordance with section 6:01 (the identical language in its March 1994 final offer) and that section 6:01 shall be deleted and revised to read "Salesmen shall be compensated in accordance with the wage and salary program put into effect by the Employer, except that no salesman shall be paid less than [the amount and formula to be negotiated at the bargaining table]." This language in its salient features is identical to the first paragraph of section 6:01 of the March 1994 final offer. This proposal also eliminated the obligation to provide accounts of substantially equal volume to salespersons from whom accounts had been removed through assignment and reassignment and is identical to section 10:02 of the final offer.

As Glassman explained it, each of the companies at the bargaining table had different marketing plans and objectives. The Group members were no longer willing to merely pay a percentage of a sale to a salesman without adding value to the cost of the product in some form or another. The Group was ready to address certain concerns of the Union expressed at the bargaining table. When the Union said that by this proposal you could take away all earnings, Glassman responded the Group would be willing to consider a minimum earning amount. As to Union fears of hurting a salesman in the transition from one form of compensation to another, the Group was also prepared to respond at the next meeting. As noted previously, the final proposal included a base compensation for the first year of the new agreement of either 75 percent of 1993 commissions or $50,000, whichever is less.

But as to answering the union objections to administering a contract with all the varying compensation schemes indicated and its later demands for specific compensation, Glassman provided no real response except to note that the schemes could vary between salary, salary plus commission, and commission itself could vary between a percentage of sales and cents or dollars per case sold, and include incentive schemes as well. These schemes would vary between companies and vary depending upon the nature of the account, whether on or off premises, the nature of the product, and whether on or off premises, the nature of the product, and whether a salesman visited accounts or dealt primarily by phone with the buyer. When a union representative asked, aren't you really proposing you could have an individual compensation scheme for each salesman, Glassman admitted he answered yes, that could be the case, but added he didn't think that was practical and could ever work.

In sum, Glassman proposed a basic framework in which commissions would be based on the nature of the produce sold, the type of effort performed and the incentive the company was offering to market the product. Glassman admitted he did not indicate a willingness to discuss and agree with the Union at the table as to the basic formulas that would apply. The Group could only indicate the various schemes available to any employer setting up a compensation structure, but to set forth every scheme or structure and agree to it at the table would hardly be possible. Glassman did later suggest the contract could contain the general types of compensation structures the Group members were contemplating.

In response to a question by the undersigned about the nature of bargaining or discussions with the Union after a company adopted a particular compensation structure, Glassman responded that the company would advise the Union, tell them what they wanted to do and when and they would discuss it and agree on it. According to Glassman the parties had a 40-year history of working out problems and issues. But at no point did Glassman state that before making its decision on a new compensation scheme that the company would negotiate with the Union as to its particulars.

If certain salesmen felt they were not being equitably compensated under a newly adopted scheme, the Group would be willing to subject its calculations or applications to arbitration but did not want to subject the system itself to arbitration. Thus, the final offer precluded submitting the terms of the written compensation program to the grievance and arbitration procedure.

When the Union said the compensation system contemplated could absolutely destroy the earning power of certain very good salesmen, Glassman testified the Group's response was that if a salesman felt he wasn't compensated adequately enough or felt the system being applied in his company would not provide the renumeration he felt he deserved for the effort he put in, he could go to another company.

Although the Union expressed opposition to the section 6:01 compensation proposal, several times during negotiations and subsequently in settlement discussions they did state that if they knew the specific compensation structure of the Company they might deal with it.

Thus, in a letter dated February 25, 1994, to the mediators and passed along to the Group counsel, Verdoni, referred to multiple compensation schemes suggested by the employers, yet, while the employers emphasize this is a key element to settlement, they have not on an individual and detailed basis provided the Union with the information it must have to discuss, analyze and bargain in an intelligent and meaningful manner.

By the end of the winter or early spring 1994, the Group and the Union had reached the point where the discussions were not resulting in any changes in position and were becoming repetitious. At this point management let the Union know they would be implementing their March 24, 1994 proposal effective June 1. The Union's unanimous rejections of the proposal took place, shortly followed by the exchange of letters in which Union Counsel Cohen sought on May 17 to learn exactly the compensation to be implemented for each unit salesperson and Glassman responded on May 23 that prior to implementing any changes in the sales representatives' compensation structure pursuant to article 6 of the March 24 proposal they will "advise the Union as to the timing, criteria and procedures for determining and paying such compensation."

Glassman described his letter as telling the Union in a timely manner when and if there would be a change, what this change would be, and how the change came about and why. The Union was not shy about responding and meeting to talk about such matters. Later, Glassman stated that the Union would be notified. They would know about the compensation system. They could participate in the discussions with the salesmen. But they could not seek to change the system through interest arbitration. In this description, Glassman failed to state that what the Group would disclose was subject to negotiation before implementation. And in using the phrase "advise," a very experienced negotiator who drafted the language along with his partner Lanier was avoiding the language that would clearly alert the Union that it would have an opportunity to truly negotiate as to a decision already made, under a proposal—the language of section 6:01—which precluded negotiations over the terms of the wage and salary programs put into effect by the Group employers. In describing his May 23 letter, Glassman was using language substantially similar to that contained in the second paragraph of section 6:01 which only required that "[t]he Employer will provide the Sales Representative, prior to implementation and the Union upon request, with a written explanation of the wage and salary compensation program applicable to the Sales Representative."

In a later explanation, Glassman described a process in which the Union would have an opportunity to discuss and seek to modify a particular compensation scheme, but if the company involved remained unmoved, it would implement that scheme, meanwhile providing a minimum and transition protection, but being required only to arbitrate any grievance over its application, not the setting of the scheme itself. This protection was sought by the Group to obtain changes in compensation from commission only, which the Union wished to retain, to some combination involving salary which the companies needed to remain competitive.

During his cross-examination, Glassman acknowledged that when the Union asked for specifics he probably told them the Group was seeking flexibility, and that complete flexibility means complete flexibility. Neither were the several kinds of compensation systems he offered to the Union ever reflected in any written proposal. Neither had the Group made a counter offer earlier once the Union rejected the 3.5-percent commission rate proposed as a bottom line.

Glassman was thus forced to admit that nowhere in section 6:01(a) in the final, implemented offer is it noted, expressly, that the Group will bargain with the Union in determining what its wage compensation program will be. Glassman also agreed that what the Group was seeking in section 6:01(a) was total control over the setting of the method of compensation. If the Union did not agree with whatever method or methods the Group employers chose for each employee or group of employees there was no avenue for the Union to pursue its differences.

In a revealing letter dated March 1, 1994, from Lanier to the mediators but which was passed along to the Union, Lanier, for the Group responded to Verdoni's January 25 letter requesting information concerning the Group's final proposal. Lanier writes, "Contrary to the Union's letter, the Employer never proposed 'multiple compensation schemes.' Rather, the Employer proposed to maintain the flexibility to implement, in its sole discretion, any type of compensation scheme that would address its business needs and market conditions. The Employer specifically stated during numerous bargaining sessions that it would not agree to contract language that sets forth specific compensation schemes either by house or by sales representative." At page 2 of the letter, Lanier notes, "In light of the Employer's proposal to maintain ultimate flexibility to determine compensation systems that would be applied to its sales representatives, the Employer has already provided the Union with all the 'details' that are available."

Under further cross-examination by Union Counsel Glassman sought to defend the absence of the words, "negotiate" or "discuss" with the Union in section 6:01(a) as not reflecting any intent to preclude negotiations over the terms of the compensation schemes. I find much of these interchanges represent fencing with counsel, are contradictory of his earlier testimony, and exhibit an avoidance by Glassman of the responsibility of using language which would have clarified the Union's role in jointly establishing the new compensation programs. To rely, as Glassman did, on a history of labor bargaining in the industry and the statute as justifying terminology giving every appearance of making employer unilateral decisions on compensation a fact accompli, is somewhat misleading and disingenuous.

Glassman also agreed that the unit employees would be provided with copies of any agreement reached so they could understand the provisions, that, in particular, affected their compensation. They then would be able to note the Union's severely reduced role in jointly setting their renumeration. Consistent with the reduced role of the Union was the identical wording of the individual Group employer May 1994 letters to their salespersons informing them that "As we told the union, no sales representative's compensation will be changed without prior notification." In one letter, to Jaydor sales representatives dated May 25, as described earlier, President Silverman, reported, inter alia, that "the contract proposal being implemented gives us the right to formulate the compensation system for sales representatives." and further, "that should we decide on any specific changes that impact you, we will notify the union, and you, in advance."

Finally, while Glassman testified that under the law, the Union had the right to demand bargaining about the timing, criteria and procedures for determining and paying any changes in the sales representatives compensation structure pursuant to article 6 of the Employer's March 24, 1994 proposal, his letter to Cohen of May 23 says nothing about negotiations on its face. Glassman explained that his May 23 letter was in response to Cohen's May 17 letter, and was an attempt to clarify what appeared to be a confusion on Cohen's part as to the willingness of the Group members to negotiate the new compensation systems prior to implementation. Yet, Glassman was compelled to agree that the March 24 contract proposal made 2 months earlier did not spell out the Union's right to negotiate the compensation program to be explicitly put into effect by the Group members, and thereafter to be explained to the Union at its request.

The Respondent called Emil Verdoni, the Union's president as its own witness, in a further attempt to establish a known practice by the Union of condoning house accounts among the Group's competitors. Verdoni denied any knowledge of any one, i.e., any employer under contract with it, having house accounts. During the 1993 negotiations, when certain representatives of employer members of the Group indicated they wished to have house accounts, Verdoni told them no company in the industry would be permitted to have house accounts with Local 19 and there would be house accounts over his dead body. Verdoni agreed he told the union membership if the Union permitted house accounts it would be the end of the Union. Verdoni was not asked to confirm or deny Barnett's testimony complaining, generally, about the existence of house accounts at certain companies.

It appears that Verdoni knew about the receipt of commissions to the three individuals about whom Union Official Richman had been previously questioned. But in each case Verdoni denied that their commission earnings represented creation of house accounts or that the three were housemen. As to Bronstein, Verdoni said he had been a close friend. He knew Bronstein had been close to the owners of F & A but denied any knowledge of his alleged position as warehouse manager, declaring that he knew both day and night F & A warehouse managers. Verdoni asserted that Bronstein was a member of the Union and had been a commission salesman for many years and these commissions comprised his sole income. Even if he was manager, he did not manage or supervise salespersons and was not thereby disqualified from receiving commissions as a bargaining unit salesman. As earlier noted, since F & A had been a Group member until 1993, the most favored nation clause could not be applied to F & A's past practice, even if it could be claimed, in error, that F & A maintained house accounts. And, on Bronstein's death in August 1993, any alleged past practice involving him ceased. In any event, under the Union's definition of a house account, which requires the owners to retain commissions, F & A's and the Union's conduct, in permitting Bronstein to receive commissions, was not the creation or establishment of a house account in violation of article III of the 1990–1993 agreement. A later witness for Respondent, Myron Feldman, chairman of the board of F & A Distributing Company, described Bronstein as a close friend from boyhood who was his partner in other businesses. At F & A he was considered to be a member of the family and performed unspecified duties in the warehouse and kept an eye on things for the owners and reporting to management, in addition to being a full-time salesman. Documents received in evidence show Bronstein was permitted to sign purchase orders on behalf of F & A for large pieces of warehouse equipment from 1986 to 1989 and that he signed, on behalf of F & A, two letters in 1991 discharging a driver in a separate bargaining unit represented by the International Brotherhood of Teamsters. Respondent argues that regardless of the applicability of the most favored nation clause to Bronstein's receipt of sales commissions while functioning as a de facto manager, F & A received a competitive advantage over the Group members in the 1993–1994 negotiations from saving money by not paying Bronstein any salary for his warehouse work but permitting his receipt of commissions in lieu of salary and that this was a motivation for Respondent's removal of the prohibition against house accounts in the Group's final offer. But according to Feldman, with 50 years in the business, Bronstein was not a house man; his sales did not meet his understanding of a house account, which was an account without a salesman, but sold by a salaried person or executive of the firm. Verdoni's definition added to this the factor that the commission retained by the company had to deprive a Local 19 member of the opportunity to sell and make money and Bronstein's receipt of commissions did not do that.

Concerning Arnold Goldberg, an owner of Goldstar, Verdoni testified he confronted Goldberg shortly after his election as union president in January 1985, after hearing he was drawing sales commissions. Goldberg told him he was a union member since 1950, that his father owned the business, and that he worked every day as a salesman and did not draw any salary as owner or manager. When his father died in the 1980s Goldberg inherited some ownership shares but continued his union membership and selling and earning commissions. After learning from others at the company that Goldberg covered a run everyday, Verdoni said he could not tell him to get off the road. Although present at the bargaining table on the owner's side he did not participate in negotiations and his two brothers operated the business and dealt with Verdoni and the Union. Verdoni did not understand that Goldberg was an officer of Goldstar Verdoni maintained that the article III prohibition on house accounts was not violated by Goldberg's receiving commissions on sales he generated. In fact, Goldstar was an employer member of the Group since 1989 and before its dissolution or buyout. Prior to 1989, when Goldstar had been an independent employer, there had never been any complaints or grievances by Group members regarding commissions received by Goldberg. Neither had there ever been any Group employer or industry complaints about F & A maintaining a house account by virtue of Bronstein's receipt of commissions. In fact, no complaints had ever been made by Group or other employers about improper house account arrangements until the damage phase of a Fedway arbitration proceeding about a year before this hearing, to be discussed, infra.

Verdoni knew Tom Dirigibus of American B & D, listed by them as a commission salesperson, had become a manager there. Dirigibus had been a union member for over 30 years and was a salesman. The American B & D owner's sister is Dirigibus' wife. Verdoni had no knowledge that Dirigibus earned a salary. The record contains evidence and Respondent does not dispute that since becoming a manager, Dirigibus' commissions have been pooled for distribution to unit salespersons.

On one occasion, Verdoni came down hard on a member, Steve Vagotsky, who had fairly substantial earnings as a salesperson, when Verdoni learned that he retained a solicitor's permit to sell for five companies associated with Fedway. Vagotsky complied when Verdoni informed him he could only represent one company or subsidiary and drawing commissions on sales for all five was unfair. In the discussions with Vagotsky it appears that Verdoni accused him, improperly as it turns out, of being a houseman.

Although the Union receives yearly sheets from Group members, as well as other contracting employers, showing commissions received on sales, they were not generally used by the Union to investigate whether house accounts were being created, but were useful in learning how commissions derived from a particular assigned run of accounts of members who had died or left the industry were being reallocated, whether divided among other salespersons or even retained by the owner in violation of article III. Apparently, according to Verdoni and confirmed by records in evidence, some companies reported annual earnings of managers to the Union on the sheets, even though it was evident they did not sell or earn commissions. In some cases, these managers or owners retained union membership to obtain health fund coverage.

It was in the Union's efforts to protect and expand the earnings of salespersons that article III became part of the contract years ago. While Verdoni acknowledged that the casino royalty pool is a house account in the sense that it is solicited and sold by management, by insisting on an arrangement to have the royalty or resulting commissions shared by salesmen, the Union has been providing protection to its unit employees.

Certain documents received in evidence toward the end of the hearing show a total of $121,287.77 in commissions not paid to unit salespersons by Jaydor for a 4-1/2-month period since it implemented, effective November 10, 1995, the withdrawal of club accounts from its salespersons, pursuant to the March 1994 final offer. By letter dated February 29, 1996, DeMarino sent a memorandum to all employees, but not to the Union, informing them that starting March 1, 1996, Dobbs Wine & Liquor, a Division of Jaydor Corporation will be servicing its club customers and selected key accounts, and all primary advertisers in New Jersey. The memorandum went on to list the sales sanager, two key account managers and two marketing representatives servicing these accounts. It appears, based on an offer of proof received in evidence in lieu of testimony by Jaydor President Silverman, that the name of Dobbs Wine & Liquor had been used in the past by Jaydor for the purpose of filing base liquor prices with the State Liquor Authority in contemplation of making sales through that division, although it never did so. The idea of using Dobbs to market club accounts evolved over time; since November 10, 1995, club accounts had been marketed and serviced through its existing wine houses. Of the two marketing representatives named in the memorandum, one had never been a sales representative in the bargaining unit, and the other had been a unit sales representative in 1995, but had been terminated for failure to earn the minimum required commission after having been subsidized for a time.

Finally, on the question of the most favored notion defense asserted by Respondents to the allegation that their unilateral implementation of the proposal permitting house accounts was independently violative of the Act, the Union introduced two arbitration awards. The first, dated March 3, 1995, dealt with a Union grievance against Fedway claiming a failure to pay salesmen's commissions under the 1990–1993 agreement. The Union claimed that the sales, made through an affiliate which was activated for the particular purpose of making pallet sales at low prices to meet competition, and whose sales were apparently made by nonunit personnel, nonetheless came under the contract's coverage and required the payment of commissions. The arbitrator rejected a defense that the sales were to 'unsold accounts' as defined in article III and therefore, required commission payments from the first day of sales rather than after 30 days. Article XV was also violated since the sales were accomplished through supervisors and not credited to union salesmen. The arbitrator discredited an assertion by President Leventhal that he did not have the intention to avoid paying the commissions when he created the pallet sales concept and utilized an inactive affiliate. As the Fedway affiliates were found to be a single employer, the award of unpaid commissions on gross sales in excess of $6 million ran against all six of them and directed the parties to meet timely to attempt to agree on the exact figure due, but retained jurisdiction in the arbitrator in the event of a failure to agree.

The second award, dated March 12, 1996, recounted a failure of the parties to agree and a subsequent hearing held on November 15, 1995. It was at this hearing for the first time that the Employer raised a most favored nation defense, claiming that all the commissions were due and payable to an individual named Dokachev, the designated salesman for the resurrected affiliate, even though he was a manager, as its director of finance, because the Union had permitted other managers to join and receive commissions and therefore had to apply this more favorable practice to Dokachev. The arbitrator noted that this defense had not been raised in the earlier phase of the case, the matter of Dokachev's entitlement to commissions had been decided adversely then to the Employer since its activation of the passive house, and attempt to add Dokachev as a salesman by submitting an altered Local 19 dues transmittal form had been found to be improper, and, moreover, the earlier award obligated Fedway to sell through the selling houses within the Union's jurisdiction, and not a name which had no salesmen or accounts and was no longer covered by the labor contract.

This belated and unsuccessful attempt by Fedway to raise the most favored nation article 10.01 of the 1990–1993 contract appears to have been the very first time the Group or any member sought to do so with respect to the use of managers to receive commissions, and thereby create a house account, and was only done so after all of the charges had been filed in the instant proceeding.

C. Respondents' Alleged Discriminatory Removal of Sales Accounts from Edward Primavera

Edward Primavera testified that he had been employed by Royal for 29 years as a salesman, earning commissions based on goods sold to assigned retail liquor outlets. He was a member of Local 19 since 1965, a shop steward for the last 7 or 8 years, and a Board member and member of the employee negotiating committee for the negotiations which commenced in the summer of 1993. Primavera was active in the strike which commenced in October 1993, serving as a captain to man and check on the picket lines established at the northern and southern division locations of his employer, Royal. He picketed the Royal premises 4 to 5 hours at a time for the almost 3 full weeks of the strike. Primavera described the strike as being short-lived because many employees crossed the picket line and returned to work. In his own southern division all but four employees out of 32 eventually crossed the line by the time the strike terminated. Primavera was one of the four who did not cross the line. Primavera was the only one of the four who was a steward and who served on the negotiating committee.

Those employees who crossed and returned to work early in the strike were going into and writing orders on accounts assigned to strikers. Primavera learned from his own customers that crossovers were writing orders on his own accounts. In one instance, Primavera followed a truck and discovered the driver was delivering an order placed by a crossover on one of his accounts. Because of his relationship with the particular customer the order was returned and Royal was informed Primavera would be that customer's salesman after the strike.

On a Friday, the first day back to work after the strike, Primavera's sales manager told him there had been a review of accounts, and he was given a list of his to review with certain accounts removed. Twelve out of 82 had been removed, leaving him with 70. Over the weekend, Primavera received a message on his voice mail to disregard the list, and the removed accounts would be placed back on his book. He understood other employees complained to the Union and this resulted in the restoration.

After the strike Primavera continued to serve on the Union Executive Board and the bargaining committee. After the final offer was rejected by the membership in late May 1994, Primavera suffered a heart attack, was hospitalized before Memorial Day and was released 8 or 9 days later on the following Friday in early June. After the tests disclosed he had a blockage he had to return to the hospital for an angioplasty on June 12. Afterwards, from mid-June, he recuperated at home and serviced his accounts by telephone on a regular basis, twice a week, his customers expressed satisfaction and his sales actually increased. Eventually, he returned to his preillness work activity, he believed, in September 1994.

In either October or November 1994, Primavera was called into the office and informed by Henry Feney, his sales manager, that he was removing two accounts from Primavera's ledger, Walls Liquors and Lincroft Liquors. Between them, Primavera was earning $3500 to $5000 yearly in commissions on annual sales. Lincroft had reopened after being closed and Primavera was developing it, placing a lot of new items and the account was growing. Primavera learned that a Billy Stryker, who had crossed the picket line and returned to work during the strike, was assigned the Lincroft account. Feeney only said that the removal of the accounts was his decision but did not explain why he did so. As to the Wall account, the owner who had been placed on C.O.D. status by Royal for slow payments on bills, and was later warned he would not receive further deliveries unless prompt payments were made, became angry with Royal and Primavera, who was unable to change the Royal policy, and ceased placing regular orders, thereby resulting in lower sales and commissions before Primavera was removed as salesman. When Primavera complained about not receiving any accounts as compensation for losing the two (under art. 10:02), Feeney and Frank Bilancio, then vice president of sales in Royal's southern division, told him accounts would be coming his way, mentioning a new store, part of the Spirits Unlimited Cooperative, would be opening. As a consequence of the promise Primavera did not push for immediate compensation. At about the same time, Primavera was told about an F & T account in Shrewsbury, part of the Spirits Cooperative, which would be opening up.

In November, Primavera learned that the old F & T account which he had long serviced and had closed, had now reopened and Primavera approached the new owners, advised them on certain items and placed their initial liquor order. Primavera spoke to Bilancio who told him he would be getting this account as of December 1, 1994. And on a document forwarded by fax to Bilancio from the Spirits Cooperative coordinator, Bruce Hamilton, Primavera's name is listed as the salesman for the Royal liquor sales to F & T and included a handwritten notation by Hamilton confirming his request for Primavera made to Bilancio. Of the five different company salesmen listed on the document faxed by Hamilton to Bilancio, only Primavera was not assigned the F & T store account. Each of the salesmen listed for F & A, Rietman (R & R), Jaydor and Fedway, were assigned by their respective companies. Yet, Primavera received no commissions on this sale, was not assigned this account and was not compensated with any replacement accounts.

After the strike Primavera had a conversation about the strike with Bilancio during which Bilancio told him you know what I think of your union and I don't even want to discuss it. Bilancio also told him he had made a big mistake by going on strike. When Primavera continued to question him about not receiving new replacement accounts at sales meetings, Bilancio told him how could he possibly expect for the company to cooperate with him with the position he took because he aligned himself with the Union.

In February 1995, Primavera had his regular annual review about his sales performance in 1994. He was presented with a sheet reflecting his account activity compared with prior years. Although his performance was fairly good Feeney and Bilancio told him he had dropped the ball on the "President's Circle," an incentive program under which salesmen who meet targeted monthly quotas on particular products, receive a dinner at the end of the year. Primavera had won this award for 7 or 8 years in a row, every year it had been offered, except for the year of the strike, when he was never invited to participate. Primavera told them how could you possibly hold this year's results against me, given I was out sick for about 6 months. They said there was no excuse for this performance and then they told him they were removing the Allaire Liquors account in Red Bank from him. They gave him no explanation for the removal. Primavera had done $116,000 to $120,000 in sales in 1994, worth $6000 in commissions, more with incentives. It was the biggest liquor store in its area and he had helped set up the store when it opened. Primavera later learned that crossover striker Billy Stryker had been assigned to this account.

Primavera complained bitterly about this removal and told the supervisors he would see them in court. They offered him two accounts in its place, Patassies Red Lion Inn and Parkway Liquors in Bricktown. They were combination bars and package stores. Primavera estimated their sales as totaling roughly $20,000 each annually with total commissions of $2000 to $2,500. He had serviced these accounts years before and they had little value. Primavera rejected the offer because they weren't fair compensation for the loss of Allaire.

Primavera also described a past practice before the strike when a new account opened and is issued a new license to sell liquor. When he wrote the first order on such accounts by personally soliciting the business he would be assigned the account as an incentive for opening new accounts. Primavera gave some examples of this practice, naming individual stores.

Since the strike, Primavera wrote the initial order for a newly issued licensee in Cream Ridge, New Jersey, called Goods to Go. He had seen an ad in a publication, learned they wanted to join the Spirits Unlimited Co-op, contacted Susan Amburgey, the owner, went in to the store and wrote the order. On June 21, 1995, he arranged for the owner to sign a form he had prepared entitled "Requested Sales Person" and list his name as the salesperson to be credited with 100 percent of the licensee's cooperative purchases and all resulting commissions, and filed it with Royal. When Primavera called Royal the next day for the order number so he could place the order through the computer he was first told management was away, and then a few days later was told by the coop coordinator that the account had been assigned to another salesman.

In a subsequent conversation with Susan, the owner, she informed him that Royal had not given her the privilege of selecting the salesman, she had refrained from placing an owner, and he went into the store on the following Saturday and wrote up the opening order. Primavera then called Bilancio to plead for the account, noting the owner's preference for him but was told that the decision had been made by the company and it stands. He learned the salesman assigned was Joe D'Angelo, another cross-over.

Another sales practice Primavera described relates to a store which closes and then later reopens. If it is a large store, when it closes the company tries to compensate the salesman. Normally, if it reopens the original salesman has the right to sell the store again. When Towne Liquors, an account on Route 35 in

Middletown he had serviced for 25 years closed around Thanksgiving in 1993, Primavera was not given any compensation. When it later reopened in December 1994, before the holiday season, it was assigned to a James Malibashca, another cross-over.

During his cross-examination Primavera testified he saw Feeney, Bilancio, and Domenick Biasi, a sales manager, since retired, come out to the picket line and talk to pickets, but not to him, because, in his view, they had enough sense to stay away from him. In discussions on the picket line he overheard Biasi tell pickets they were making a big mistake, their alliance should be to the company, not the Union, that's who pays them. He was informed by fellow pickets of similar remarks made by the three to them.

Primavera understood that the F & T Spirits Unlimited Corp. in Shrewsbury had no Royal salesman assigned to it for over a year; the store owner, a man named Frank, informed him on periodic visits that nobody was coming in to see him from Royal Liquors. Yet, he had seen orders in writing for that store which were substantial in size.

Primavera was a thoughtful, responsive witness. During his cross-examination when pressed about any negative comments made to him about his participation in the strike, he repeated in substance his testimony on direct that within a month after the strike Frank Bilancio had told him he had aligned himself with the Union and had to live with it. These statements were repeated a few times by Bilancio in the presence of Feeney. Although Primavera's pretrial affidavit contains a statement that no one from management threatened him or otherwise commented on his strike activity when he returned to work, it also contains earlier references to Biliancio's negative comments about his aligning himself with the Union. It is apparent that Primavera did not consider this and like comments to be threats,[5] but that they showed an attitude towards him which was reflected in the removal of, and failure to assign to him, certain accounts and thereby helped explain company decisions in this regard, particularly when he was not provided with any explanations on the Wall, Lincroft, and Allaire removals or the refusal to assign him the F & T account after the coop coordinator had requested him and apparently received an assurance about his assignment.

With respect to the Cream Ridge account assigned to a crossover, Respondent's cross-examination seemed to claim the location of the account was well outside Primavera's geographic territory. Primavera testified he serviced a very large territory which requires over an hour-and-a-half travel time on his part from the southern most, to the northern most account. He also handled an account in Manalopin only 15 minutes drive east from Cream Ridge.

Henry Feeney testified for Respondent. He had a friendly relationship with Primavera which on occasion, extended beyond the work place. During the strike his verbal exchanges with pickets during the strike were only the exchange of pleasantries. Feeney also observed Bilancio and Biasi doing the same on occasion. Feeney confirmed that 28 of 32 southern division salesmen returned to work before the end of the strike. In view of the added pressures placed on them and extra long hours worked by Feeney and the other managers by virtue of the strike, the comments overheard by Primavera and reported to him, the lack of credibility of the denials that the pickets discussed the strike with them, and the conduct of the pickets in quickly following the early few crossovers in returning to work, I find, contrary to Feeney's denial, that comments were made to induce the strikers early return to work, and probably included information that their accounts were at risk.

Feeney testified about receiving reports of dissatisfaction from Wall and Lincroft as to Primavera's servicing of their accounts, about the same time after the strike, such as not showing up and advising about items on sale or taking care of credit problems which arise from breakage and the like. Feeney evidenced some lack of recall as to when these problems with Wall started, whether before or after the strike or before or after Primavera's illness. Primavera is credited that they were removed in late 1994. A later stipulation confirms this date. In any event, after the problems continued, he removed both of these accounts, but told Primavera some Spirits Unlimited family stores might be opening up and he would get something later from it. But Feeney testified, no new store opened and no replacement was provided to him. Feeney did agree that some dissatisfaction with Primavera on the Lincroft account may have arisen from his failure to receive some discount coupons on an item of liquor which Primavera didn't deliver but which a competitor received. Feeney himself delivered these coupons directly to Lincroft after Primavera informed him but Feeney did not credit Primavera with seeking them for the customer or apparently even inform Primavera he had done so. Some dissatisfaction with Primavera may have also arisen from his not visiting the store during his illness.

During the 2-1/2 months Primavera was out of circulation with his illness and recuperation, he and Bilancio physically covered the accounts on a weekly basis. It was during this period, that Feeney learned of some complaints from his accounts arising before his illness, but none resulted in any reprimands.

As to the reassignment of the Towne Liquors account which had closed for over a year, when it was reopened by a man named Rumsen, it was reassigned to a salesman, Jim Malibashca, who had an excellent prior relationship with Rumsen. In this case, these circumstances overcame the normal practice of reassigning back to the salesman who had the original account. Yet, Feeney did not provide Primavera with any replacements to cover its loss.

As to newly opened accounts, Feeney disputed Primavera that they were invariably assigned to salesmen who solicited initial orders. Royal's new customer information form used to open an account contains no reference to salesmen and Feeney was unaware of the form used by Primavera until he submitted it when the Cream Ridge account opened in mid-1995. Feeney's explanation as to why Primavera was not assigned the Cream Ridge account after placing the initial order and being requested by the owner was that it was completely outside his area and was in the heart of D'Angelo's run. Primavera's closest other western most account was 20 miles away. Primavera

[5] Neither, apparently did the General Counsel since they are not alleged as violations of Sec. 8(a)(1) in the complaint.

generally covered a north/south run on the Jersey shore, D'Angelo, in contrast, has an east/west run and Cream Ridge was in the heart of it.

Feeney explained that various factors went into account assignments, including geographic coverage, past relationship with the customer, whether the salesman had the store before it closed and how long it was closed, if dealing with a renewed license, and whether an account was lost because of an act of god such as a fire.

As to Respondent's removal of the Allaire Spirits Unlimited store in Red Bank from Primavera, over a period of perhaps a year the manager had expressed dissatisfaction with Primavera's servicing of the account. He was not showing up, not showing new items, not advising on off-price deals every month. This store and another, in Middletown, were commonly owned and the general manager of both was very friendly with Primavera, so, although Eddie was talked to, the account was not earlier removed. Finally, at a meeting at which both Allaire managers sought Primavera's removal, but asked their effort not be disclosed, Feeney and Bilancio agreed to remove him. They recognized it was a large hit on his income, so they offered him three accounts, valued at between $60,000 and $70,000, in lieu of the Allaire store. Primavera after no more than two seconds, physically threw the papers back at them. Primavera also accused them of removing the account because of the Union and that higher management made the decision.

According to Feeney, and disputed by Primavera, he and Bilancio told Primavera about his shortcomings, things missing when they visited the store which they considered a key account in the State. I credit Primavera that he was not informed.

The only two written recordings of company criticism of Primavera's work performance on any account were made, both entitled ''Reprimand Slip,'' but not shown to Primavera, one in April 1994, and a second on January 31, 1995, shortly before his removal from the Allaire account. In the first, Bilancio recounts that as a result of several visits to the Allaire store and discussions with Feeney and Biasi, he believed Royal was underdeveloped there and he had spoken to Eddie about his approach and salesmanship and pointing out best buys at the end of the month and sending in drive (monthly priority) items without consent of the men. Bilancio concludes that he informed Primavera that unless his performance improved he would lose the account. In the second slip Feeney reports to Bilancio the manager's dissatisfaction with Primavera's absence from the store at the end of November and December, the 2 biggest months, as well as the first 2-1/2 weeks of January. The manager also criticized Primavera's failure to present him with new items or promotions, point of sale materials or walk the store. Bilancio's own visit to the store confirmed short comings in shelf position and distribution of key items. Further, the manager complained Eddie was rude and offensive in soliciting sales. Because his actions were deemed unprofessional and not up to minimum standards of service, Feeney recommended to Bilancio removing the account. Yet, he did not recommend, as he had in August 1994, in the case of another salesman not servicing to minimal standards, that no replacement accounts be provided.

As to the Wall and Lincroft store removals, Feeney agreed that Primavera generally got the new family Spirits stores when they opened, and that he promised Eddie something for losing the two. Yet, Feeney also agreed that Primavera was not assigned the new F & T Spirit store after writing out the first order within a month thereafter.

Even as to the Allaire account, on which Feeney registered the manager's complaints, the store's sales had gone up consistently over the period of Primavera's servicing.

Now, for the first time, during cross-examination, Feeney recalled that in addition to the Red Lion and Parkway accounts, he thought that Primavera was also offered the F & T account he had written the first order on back in December 1994, when Allaire was taken away in February 1995. But Feeney could not explain why Primavera was not given the F & T account in November/December 1994. His boss Bilancio, handled it and he was not involved with it at the time. As to the Cream Ridge account assignment, Feeney also disclosed that both Primavera and D'Angelo had accounts in Lakewood, 20 miles due east of Cream Ridge. D'Angelo, who lives in Cherry Hill, in the southern part of the state, and only 10 to 20 minutes from Philadelphia, starts his run in Cherry Hill and covers one of the largest and most unusual territories in going east to west rather than north and south.

Frank Bilancio, then vice-president for sales for Royal in its southern division, recalled periodically visiting Primavera's Allaire account in the period from late 1993 all through 1994 and receiving complaints on certain occasions from its manager that Eddie didn't keep him informed of sale prices on products for the following month so that he could purchase and feature them. Bilancio also saw lack of point of sale material or floor feature displays of Royal products on visits to the store. The store is large, containing maybe 20,000 square feet.

Bilancio confirmed that he did not show his April 1994 reprimand slip to Primavera but claims he discussed with him the substance of the complaints in the document.

At around the same time Bilancio became aware of the complaints concerning Primavera's Lincroft and Wall Liquor accounts, but that Feeney dealt directly with him in removing those accounts and he was not present when this was done. After numerous conversations with Eddie, at his annual review meeting with Bilancio and Feeney at the end of February 1995, the Allaire account was removed from him. He was told it would be replaced with three other accounts to try to make up for the loss of dollar volume. Eddie was angry, disputed the worth of the three accounts, said he didn't want them and would see us in court. Based on their sales history, Bilancio valued Parkway Liquor in Lakewood at $30,000 or $31,000, Patassis Red Lion Inn in Brick Township at $20,000 and F & T Spirits, the third, which had just opened in November or December 1994 at $25,000. This last figure was estimated on the basis of $8000 business. The three replacement accounts thus totaled about $70,000 to $75,000 in sales. Sales figures received in evidence confirm these figures for 1995, and as projected for 1996 the F & T Store should well exceed its prior sales. Bilancio acknowledged that the Allaire account had about $116,000 in sales. Documents in evidence show sales of $118,474.29 in 1994 and $116,589.82 in 1993. In removing the account Bilancio alluded to the material in his two reprimand slips regarding Primavera's lack of salesmanship, poor point of sale and lack of distribution on key items.

Bilancio disputed that there was any practice of assigning a new account to the salesman who writes the initial order. In one other instance, Bilancio recalled that Primavera was assigned a new Spirits account, TGIF on Route 37, although he had not placed the opening order. In Bilancio's opinion, D'Angelo was assigned the new Cream Ridge store because it was more closely aligned with his geographic area than with Primavera's area.

An examination of the map of New Jersey received in evidence, which pinpoints the locations of Primavera's accounts, predominantly along the Atlantic shore line and up and down the Garden State Parkway from Manahawkin in the south, to Atlantic Highlands in the north, and which describes in circles, as supplemented by Bilancio's testimony, the geographic area covered by D'Angelo running northeast from his home in Cherry Hill, it is apparent that Cream Ridge is located much closer to the bulk of the area covered by D'Angelo than to the accounts serviced by Primavera.

Bilancio denied having any discussions with pickets about the negotiations and collective bargaining, although it was difficult servicing customers and he was curious about when the strike would end. He was also unaware of any confrontation or discussions between Biasi and pickets. Bilancio also denied that in his conversations with Primavera concerning his dissatisfaction with the way he was handling his accounts he had indicated that his actions were the result of the fact he was a union official, had filed charges with the Board or was litigating with Royal. These questions and answers which are quite limited do not preclude finding that Bilancio had made the comments attributed to him by Primavera critical of the strike and Primavera's participation in it or even the comment about aligning himself with the Union in response to Primavera's questioning him about not receiving replacement accounts.

I have previously credited Primavera as to the comments he heard Biasi make to the pickets and those reported to him made by Feeney and Bilancio. I do not credit Bilancio's denial that he discussed the strike or sought the pickets return to work. I also find that Bilancio made the remarks attributed to him by Primavera in their discussions at work.

During his cross-examination, Bilancio confirmed that Bruce Hamilton, the coordinator for Spirits Unlimited cooperative store, had telephoned him on December 1, 1994, and had requested Primavera to service the F & T account for Royal. Yet, Bilancio also agreed he did not assign the account to Primavera at that time. He told Hamilton that Eddie would not be the salesman until after the first of the year. Bilancio could not recall if Feeney told him when he removed the Wall/Lincroft account that he had promised to give this account to Primavera when it opened.

On further redirect examination Bilancio corrected his earlier testimony regarding his conversation with Bruce Hamilton. He now testified that whenever a Spirits store opened, Hamilton always asked for Eddie. If it was a family store he would oblige or arrange a swap so Eddie would be assigned. The F & T was not a family store. On this occasion on December 1, he told Hamilton he had assigned another salesman to F & T and he would meet with Hamilton after the first of the year and discuss the assignment. Hamilton was not happy and Bilancio said he would look into it. Bilancio explained that the Spirit coop wanted the same company salesman in all their stores and Hamilton was comfortable with Eddie as the Royal salesman. In January, at their meeting Bilancio told Hamilton he couldn't accommodate him every time a Spirit store opened and he was going to retain the salesperson who had the account before it had became a Spirits affiliate. Then, in February 1995, Bilancio did offer this store to Eddie to provide him with some sales volume to make up for his loss of the Allaire account.

Under further cross-examination, Bilancio was unable to explain and could not dispute Primavera's testimony that he had serviced the F & T store for many years before it closed and then became part of the Spirits cooperative. Neither could Bilancio recall that it was Primavera who wrote the opening sales order after F & T reopened.

A significant factual dispute has arisen regarding whether or not Respondent offered Primavera a third account—the F & T store—when it removed the Allaire account from him in February 1995. Primavera nowhere mentions a third account being offered when he rejected the two accounts because from his past experience with them they were relatively worthless. Neither was Primavera cross-examined as to Respondent's claim of the belated offer of the third store. It was only during his cross-examination that Feeney mentions the F & T account. Bilancio's explanation as to the reason for not initially assigning Primavera to the F & T account is unconvincing, given his inability to counter Primavera's multiple claims to the assignment, including his long-term servicing of the account prior to its closing. I am not prepared to find that Bilancio was prepared to now assign an account he had earlier improperly withheld from Primavera when he removed the Allaire account. In this conclusion I also rely, at least in part, on the credited testimony of Primavera attributing to Bilancio a motive of refusing to cooperate with him on the assignment of replacement accounts because he had aligned himself with the Union. Furthermore, in light of Primavera's claim of being treated unfairly and discriminatorily when he was denied the F & T account in November or December 1994, when it reopened, if the F & T account had been included in the offer 2 months later, it would be reasonable to conclude that Primavera would have recalled it and might even have looked favorably on the three store replacement offer. While Feeney spoke of an offer of $60,000 to $70,000, Bilancio described an offer of $70,000 to $75,000 and Primavera's figured the offer was for accounts with sales of approximately $40,000, I find that the replacement offer to Primavera was for two accounts only and did not include F & T.

ANALYSIS AND CONCLUSIONS

The consolidated complaint alleges that about March 24, 1994, Respondent Association insisted to impasse on a wage proposal which included the language contained in its proposed section 6:01(a) set forth at page 5, supra, thereby seeking total unilateral control over wages. The complaint further alleges that since the aforesaid date Respondent Association has failed to bargain as to the timing, criteria and procedures for compensation of employees in the unit, and then finally alleges that by its overall conduct, including the conduct described, it has failed and refused to bargain in good faith with the Union. I conclude that these allegations are supported by a preponderance of the evidence.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees." Section 8(d) defines the duty to bargain collectively as the "performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good-faith with respect to wages, hours and other terms and conditions of employment." The duty imposed on the parties under Section 8(a)(5) to bargain collectively does not obligate a party to make concessions or yield a position fairly maintained, *H. K. Porter Co. v. NLRB*, 397 U.S. 98, 106 (1970); *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952). On the other hand, the parties are obligated to do more than merely go through the formalities of negotiation. There must be "a serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485 (1960).

The foregoing does not mean, however, that the Board is prohibited from examining the contents of the proposals made. The Board "must take some cognizance of the reasonableness of the position taken by an employer in the course of the bargaining negotiations" if it is not to be "blinded by empty talk and by the mere surface motions of collective-bargaining." *NLRB v. Reed & Prince Mfg. Co*., 205 F.2d 131, 134 (1st Cir. 1953). See *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). Thus, in determining whether there was a lack of good-faith effort to reach agreement the Board will consider the totality of a party's bargaining conduct, including the presence of unreasonable bargaining demands. In *Reichlold Chemicals*, 288 NLRB 69 (1988), the Board reaffirmed that in examining the totality of conduct it will consider as part of the evidence a party's insistence on "extreme proposals" in determining whether a demand was "designed to frustrate agreement on a collective-bargaining contract."

An employer's insistence on unilateral control of all wages evidences just such an unreasonable proposal as can result in a finding of bad-faith bargaining. In *Harrah's Marina Hotel & Casino*, 296 NLRB 1116 (1989), the employer proposed no wage rates nor maximums or minimums and the size and procedures for determining merit increases would be decided unilaterally, with disputes made subject only to an internal appeal procedure with no union recourse to the grievance—arbitration provision of the contract. This wage proposal was accompanied by others to reduce and eliminate existing benefits. This insistence on controlling all assets of wages was found to be one part of a pattern of conduct supporting a finding of bad-faith bargaining in violation of Section 8(a)(5). In *Alba-Waldensian, Inc*., 167 NLRB 695, 696 (1967), enfd. 404 F.2d 1370 (4th Cir. 1968), in addition to refusing to supply data necessary for the charging party to discharge its function as the collective-bargaining representative with respect to the vital subject of wages, the employer eliminated piece-rate guarantees unilaterally and did not provide the charging party adequate data from which to bargain with respect thereto. From the outset of negotiations it insisted not only upon the maintenance of the existing wage structure but also upon the right to cut wages unilaterally if it so desired. The Board stated, at 696: "Its insistence upon retaining the right unilaterally to control during the contract term an item as vital to an agreement as wages appear to us, moreover, the clearest manifestation of bad faith." A significant element of the Board's finding of bad-faith bargaining in *John Ascuaga's Nugget*, 298 NLRB 524 (1990), was the employer's insistence upon total control of wages, seniority, and work rules, thereby excluding these items from the bargaining process both at the contract-negotiation table and throughout the term of the contract. Such conduct, said the Board "was all the more likely to frustrate agreement because of the Respondent's refusal to provide any justification for placing subjects of such importance to the employees beyond the influence of the employees' collective-bargaining representative." Id. at 527 (Footnote omitted).

While the Board has held that an employer's bargaining to impasse on institution of a merit pay program with amounts to be determined solely by the employer under the totality of all of the circumstances is not violative of the bargaining duty, *Colorado-Ute Electrical Assn.*, 295 NLRB 607 (1989), enf. denied 939 F.2d 1392 (10th Cir. 1991), cert. denied sub nom. *Electrical Workers IBEW Local 111 v. Colorado-Ute Electrical Assn.,* 112 S.Ct. 2300 (1992), the Board has distinguished those situations where an employer insists to impasse on total control over all compensation issues. It did so in *Harrah's Marina Hotel,* supra at fn. 1, and, again in *Cincinnati Enquirer*, 298 NLRB 275 (1990), petition for review denied sub nom. 938 F.2d 276 (D.C. Cir. 1991), where it found no violation because "the General Counsel did not establish that the Respondent insisted during negotiations on control over its entire wage system." Id. at 275.

Where the parties have reached the point where there is ample reason to believe that no useful progress could be made toward a total agreement, the Board may determine that the bargaining is at impasse. *Whittier Area Parents' Assn.*, 296 NLRB 817 (1989).

In determining whether a valid impasse has been reached the Board will examine a number of factors relating to the pattern of behavior of the parties involved. They include (1) the bargaining history; (2) the good faith of the parties in negotiations; (3) the length of the negotiations; (4) the importance of the issues on which disagreement exists; and (5) a contemporaneous understanding of the parties as to the state of the negotiations. These factors are an aid in determining whether the impasse is a valid one or shows an "overall pattern of behavior designed to frustrate the bargaining process," *Litton Microwave Cooking Products*, 300 NLRB 324, 330 (1990).

A valid impasse permits a party to lawfully engage in unilateral action implementing its last best offer. But where the party declaring impasse and seeking to take advantage of its declaration has by its own action precluded an agreement being reached, the Board will conclude that the declaring party has forfeited its privilege of announcing impasse. See *Litton Microwave Cooking Products*, 300 NLRB at 324. Any resulting unilateral action will be held to be violative of the bargaining duty under the Act.

I find that when the Respondent produced its final offer on March 24, 1994, it was a culmination of a number of prior proposals, which in their totality evidenced an intent to frustrate agreement and violated its bargaining obligation under the Act. First and foremost, the Group's article XI proposal, on its face, manifested an insistence on maintaining unilateral control over the setting of compensation for each of the salespersons in the bargaining unit. As such, its unwillingness to bargain the timing criteria and standards for establishing the compensation for the unit employees employed by the Group members, derived from the language itself of section 6:01(a), is particularly instructive. The language purposely used could not be clearer that it is the Employer (alone) who will put into effect the wage and salary programs pursuant to which sales representatives shall be compensated. Only upon its request will the Union be provided with a written explanation of the program applicable to the sales representative. No mention is made of the right of the Union to negotiate the program applicable to each employee or even to be consulted as to the procedures, criteria and timing of the program established. Finally, the Group would, by the terms of section 6:01(a), be denied the opportunity to contest the merits of the program unilaterally determined, under the grievance and arbitration procedure.

The cases I have discussed support my conclusion that by the language of section 6:01(a) Respondent was unlawfully insisting on its right to unilaterally control during the contract term the setting of compensation for the unit employees.

Negotiator Glassman's letter of May 23, 1994, does not change this result. I have previously discussed the implications which flow from this letter. In insisting by its letter of May 17, 1994, on the basic information of the compensation plans and schemes to be applied by the Group on implementation of them as of June 1, 1994, the union counsel was seeking information to which it was lawfully entitled if it was to fulfill its bargaining obligation to the unit employees it represented. By stating that it will 'advise' the Union as to the timing, criteria and procedures for determining and paying such compensation a week prior to its intended implementation Respondent was not responding to the Union's legitimate request, but was rather giving lip service to its obligations under the Act. The letter provides none of the legitimate information requested. Neither does the letter inform the Union it will negotiate any compensation plans or schemes, or that article XI will be modified to incorporate its May 23 offer. Respondent reaffirms it will continue to make the decision on timing, criteria and procedures, only providing the Union with the results of its decision and nothing more. When almost a year later, on March 6, 1995, the Group agreed in writing to incorporate this language in a revised section 6:01(a) proposal, Union Attorney Cohen, by letter dated March 7, 1995, registered the Union's rejection of revised 6:01(a) which he reasonably asserted continued to give the Employers the right to determine and modify compensation of unit salespeople as the Employers see fit.

In using the terms it selected in the letter, Respondent appears to have viewed the Board's holdings in such cases as *Colorade-Utte,* supra, and *McClatchy Newspapers*, 299 NLRB 1045 (1990) (*McClatchy II)* and 322 NLRB 812 (1996) (*McClatchy III),* as determinative although they govern the bargaining obligation only as to merit pay proposals, not, as here, total wages or compensation plans, which are governed by such cases as *Harrah's Marina Hotel &, Alba-Waldensean, Inc.* and *John Ascuoga's Nugget,* supra. But even were these cases to be considered controlling, Respondent has failed to demonstrate any willingness to bargain to agreement or to impasse "definable objective procedures and criteria" governing compensation under its section 6:01(a) proposals. *McClatchy II,* supra. The Group had previously declared impasse, and although implementation had not yet taken place, it was imminent and it was not prepared to negotiate the compensation plans or schemes applicable to each employee. In Glassman's testimony and the correspondence from Lanier the common thread of Respondent intransigence and the right of unilateral adoption of totally new compensation schemes is made abundantly clear. The Union's role is to receive information which the Group or its members are prepared to provide it, whether timely or untimely in relation to planned implementation as to complicated compensation schemes is unclear, and without the option of either being able to assert economic pressure or to grieve or to arbitrate any resulting disagreement. This is so, because for the Union to receive such information it would have had to execute section 6:01(a) as offered with all its severe limitations as to the Union's role in helping to set and administer compensation. The final offer also included the preexisting no-strike, no-lockout language in article XI.

In view of the section 6:01(a) removal of compensation from the bargaining table in its final offer, more would be required of the Group to display an openness and good faith in offering to jointly determine the standards and criteria for compensation than merely the cited and formalistic response to the Union's demand for detailed information.

Aside from section 6:01(a), other proposals of the final offer, strip the Union of prior contractual benefits and protections in the area of compensation to such an extent, that when combined with article VI they establish a Respondent design to frustrate bargaining and an unwillingness to accommodate differences. These proposals include the right of Group members to establish house accounts, and not to compensate unit employees for withdrawing or reassigning accounts, as well as the right to assign supervision to salesmen's duties and to receive commissions. The Respondent's transitional offer limiting commission losses to 25 percent for 1 year as well as its offer of a $25,000 minimum, where average commissions are double that figure, can hardly be deemed serious compensating proposals.

I conclude on the basis of the foregoing proposals advanced and insisted upon, the evidence derived from the testimonial statements of its chief negotiator as well as correspondence by its other negotiating representative, and Group members, see *Kellwood Co. v. NLRB*, 434 F.2d 1069, 1073 (1970), that Respondent offered its revised, final proposal with no real intention of concluding a final and binding collective-bargaining agreement. On the contrary, by insisting upon its own, unilateral establishment of compensation plans applicable to each unit employee, as well as by its Group members communications directly with its employees as to the rights they had and were prepared to exercise in derogation of their Union's role as their bargaining representative, Respondent's conduct as a whole shows an evasion of its statutory duty to bargain collectively under the Act. *Harrah's Marina Hotel & Casino,* supra; *A-1 King Size Sandwiches, Inc.,* 265 NLRB 850 (1982); *Reichold Chemicals,* supra; *NLRB v. Wright Motors, Inc*., 603 F.2d 604, 609–610 (7th Cir. 1979); *Continental Insurance Co.*, 495 F.2d 44, 49–50 (2d Cir. 1974); *Kayser-Roth Hosiery Co*., 176 NLRB 999 (1969), enfd. 430 F.2d 701 (1970).

The Respondent's rational provides no legal defense for its conduct. "The Board has repeatedly held that economic expediency or sound business considerations are insufficient defenses to justify unilateral changes in terms and conditions of employment." *Van Doren Plastic Machinery Co*., 265 NLRB 864, 865 (1982), modified 736 F.2d 343 (6th Cir. 1984). Particularly is this so with respect to a terms of such importance and centrality to the bargaining process as wages and compensation. *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973). Respondent does not argue and, indeed, could not sustain a claim, that the changes in the forms of compensation, retaining nonetheless, its present commission and incentives as a major component of any changes contemplated, constitute a fundamental change in scope or direction of the businesses excluded from the duty to bargain under *First National Maintenance Corp*., 452 U.S. 666 (1981). In any event, the elevated industry standing of Fedway, Royal, and Jaydor in terms of sales and the argument that these liquor wholesalers must maintain their competitive positions hardly supports a claim of an economic crises or business emergency justifying its unilateral conduct. Cf. *Wim-Dixie Stores, Inc*., 243 NLRB 972, 974 fn. 9 (1979).

The complaint further alleges that by implementing the Group's house account proposal, removing club accounts from their salespersons, Fedway, Jaydor, and Royal committed independent violations of Section 8(a)(5).

I have already concluded that the impasse Respondent declared on or about March 24, 1994, was ineffective because it was insisting on implementing an invalid and unlawful bargaining proposal set forth in section 6:01(a) of article VI and because the combination of proposals it made in its final offer giving the Group the right to unilaterally set compensation, without Union recourse to grievance/arbitration procedures, authorizing previously prohibited house accounts and the concomitant withdrawal of club accounts, eliminating equivalent compensation on reassignment or withdrawal of accounts and granting it the previously prohibited right to assign supervisors to service accounts and receive commissions, in their totality, manifest a pervasive intent to deny the employees the right to an effective collective voice in determining the compensation terms at the heart of the collective-bargaining relationship. Without a valid impasse, the Group had no right to unilaterally implement any proposal encompassed in its final offer, certainly not one which represented a major reduction in compensation for a portion of the unit and on which the Union had long expressed opposition and against the implementation of which the Union had achieved protections in a series of agreements over the years. So long as the bargaining obligation continued, there is "a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), and cases cited at fn. 9. As a consequence, the Union had no obligation to respond to Respondents' notices of implementation and did not thereby waive its statutory right to bargain over the changes in the unit employees' terms and conditions of employment.

Furthermore, it was not the Group which announced implementation of the house account proposal, but individual Group members. By doing so, and, further, by offering to meet, individually, with the Union while the Group was under a continuing duty to bargain a contract in the multiemployer unit, Fedway, Jaydor, and Royal were engaged in conduct in derogation of the unit, undermining its integrity, and unlawfully fragmenting the overall unit at times when neither the Group nor the Union had authorized individual bargaining. *Teamsters Local 378 (Olympia Automobile)*, 243 NLRB 1086, 1088 fn. 14 (1979); *Callier's Custom Kitchens*, 243 NLRB 1114, 1118 (1979). As I have previously found, the attempt by individual Group members to bargain as to compensation with the Group's and the Union's approval had been aborted when the members' attempts to bargain full separate agreements had become apparent and were rejected by the Union. The attempt of individual members to implement individual terms of the Group proposal and to seek alternate compensation agreements covering, e.g. merchandising commission rates, were incompatible with the acknowledged continuing duty of the members to negotiate all terms and conditions of employment through the Group while no agreement or true impasse existed. Similarly, the conversion of club accounts to house accounts were not 'limited matters' where individual bargaining would be consistent with multiemployer bargaining as permitted in *Custom Colors Contractors*, 226 NLRB 851, 854 fn. 16 (1976).

The Union thus had every right to ignore the individual members' offers to meet to negotiate alternate compensation arrangements and to insist on restoration of all terms of the expired agreement which continue in effect pending completion of negotiations. While Respondent is correct in its brief that the Union would normally have a continuing obligation to bargain about the effect of an unlawfully implemented decision, the line of cases represented by *Michigan Ladder, Co*., 286 NLRB 21, 22 (1987), see also *Blue Circle Cement Co.*, 106 F.3d 413 (10th Cir. 1997), revg. in part 319 NLRB 954 (1995), are inapplicable, where, as here, employers were seeking to bargain individually on a term of employment contained in the multiemployer agreement. Moreover, the record establishes that the Group never proposed merchandising commissions as a form of substitute compensation for salespersons whose club accounts would be removed, and thus the Group members were seeking to implement terms not contained in the Group's final offer, further violative of their bargaining duty. On reflection, I do not view these alternate forms of compensation as the effect of decisions removing club accounts, but as terms of employment in their own right about which Respondent had an obligation to propose, and bargain to impasse, before attempting to unilaterally implement them.

Respondent cites *Haddon Craftsmen, Inc*., 300 NLRB 789 (1990); and *Jim Walter Resources, Inc*., 289 NLRB 1441, 1442

(1988), in support of its argument that by indicating its willingness to bargain by committing to furnish timely notice of contemplated changes, the Union had an obligation to respond and that in failing to do so it waived its right to negotiations. As earlier noted, neither the Group's final offer nor its claimed clarification of May 23, 1994, invited any response from the Union, particularly the May 23 letter from Glassman which failed to respond to Cohen's request for information. I have concluded that by its conduct at the bargaining table, the testimony of its chief negotiator as well in various correspondences apart from the May 23 letter, Respondent demonstrated a closed mind, reviewed objectively. Neither did Respondent provide the terms (criteria, procedures) which it offered to provide in the future. For these reasons, among others, I distinguished *Haddon Craftsmen* where the Board held a union which failed to request negotiations in a timely fashion with an employer which had made its intentions clear and had provided the terms of the process of reclassification of certain employees, relieved the employer of further negotiations in the matter. Similarly, in *Jim Walter Resources*, the employer had provided the terms of its proposal to cease paying certain insurance benefits, to the Union, something which was never forthcoming from Respondent.

Another complaint allegation asserts that by offering unit employees a section 401(k) plan for the first time, subsequent to the final offer, Fedway had independently violated Section 8(a)(5). The facts support this allegation. Fedway had the 401(k) plan under study for some time, and its IRS approval required substantial employee participation. However, at no time during negotiations did the Group inform the Union of Fedway's intention or propose instituting such a plan for unit employees. When employees were informed on June 2, 1994, of Fedway's interest in instituting a 401(k) plan, corporate-wide, the Union had not yet been formally notified but a letter dated June 2 had been forwarded to it in which Fedway made known its intention. In insisting upon a term of compensation never proposed at the bargaining table, the Group was not free to implement this plan unilaterally following the breakdown in bargaining, even if a valid impasse had been achieved. Neither was Fedway free to separately propose and then to implement a term where it had delegated its bargaining rights to the Group and neither the Group nor the Union had consented to separate bargaining by Fedway. So long as the Union continued to insist upon multi-employer bargaining it had no obligation to respond to this intended implementation. See *Teamsters Local 378* and *Callier's Custom Kitchens,* cited, supra.

In its brief, Respondent argues that by failing to respond to Fedway's announcement and offer to bargain, the Union waived its right to bargain about the plan. Whether or not the Union relied upon its pending Board charge, in refusing to do so, the Union was free to refrain from engaging Fedway in the absence of an overall valid impasse having been reached on bargaining with the Group for an overall agreement. Under such circumstances, as existed here, Fedway was obliged to refrain from any implementation, aside from its failure to have obtained authorization from the Group and Union to bargain independently about the matter.

As earlier noted Respondent also urges that the most favored nation article of the expired agreement privileged Fedway, Jaydor, and Royal to convert club accounts to house accounts. Even if, as Respondent argues in its brief, the most favored nation clause is a mandatory subject of bargaining which survives expiration of the labor agreement, Respondent acknowledges that it can only rely on its survival if its defense that the June 1, 1994 implementation was unlawful, is rejected. By such reasoning, Respondent would assert that without having relied on the clause at the time of its members' implementation of the final offer, it may interpose it now if the terms and conditions of employment contained therein are held to survive its invalid declaration of impasse. But survival of this terms of the agreement would not permit the Union to demand arbitration of a dispute arising from a claim of privilege under it because the grievance/arbitration article is not a term which survives contract expiration as a matter of law and Respondent admittedly refused to agree to its survival. The Union would not have recourse to assert, as it did on this record, that it did not permit house accounts to be maintained by Group competitors. Thus, Respondents' argument lacks mutuality and article X, section 10:01 which, by its language, carefully balances the claim to most favored treatment along with the Union's right to contest such claim within 15 days notice by referral to arbitration, becomes ineffective. Permitting the Group to raise this defense under all of these circumstances, I conclude, would be improper and unfair.

Furthermore, I have previously examined in detail the facts and circumstances surrounding the sales by Richard Bronstein, de facto F & A warehouse manager, Arnold Goldberg, Union member and a shareholder by inheritance in Goldstar, and Tom Dirigibus, manager of American B & D, and, I conclude that they do not constitute evidence of a practice pursuant to which the Union condoned the establishment and maintenance of house accounts by Group competitors. This conclusion is aside from the reservation I have noted as to the applicability of the clause to F & A, particularly in view of its membership in the Group until 1993 and Bronstein's death in August 1993, Goldstar's membership in the Group since 1989, the pooling arrangement on Dirigibus' commissions, and in the absence of any claim under section 10:01 ever having been made by Respondent until the second arbitration proceeding before Arbitrator Ligbit on November 15, 1995. In this connection, I reaffirm my reliance on *Control Services,* 303 NLRB 481 (1991), as precluding the Respondent members from relying on the clause in the absence of any evidence that the conversion of the club accounts was effected pursuant to it.

Respondent also asserts that the history of individual dealing between Group members and the Union on such matters as unit accretions and casino royalties, among others, permitted Group members to implement portions of the final offer and invite individual bargaining from the Union. As earlier noted, each of these instances arose during the life of prior Group agreements, when the Group, as agent to negotiate agreements, had disbanded. Each of these instances also involved normal instances of administration and enforcement of existing labor agreements and cannot be equated with unilateral implementation of contract proposals at a time when, as admitted e.g. by Michael

Silverman of Jaydor, no successor agreement had been reached and the member employers remained under a legal obligation to bargain as a group.

Respondent also claims that the Union had, 'unclean hands' during the bargaining process, thereby permitting the Group to avoid having its own good faith in bargaining tested under the Act. As to the Union knowingly permitting the maintenance of house accounts by the Group members' competitors, I have rejected that defense. As a consequence, there is insufficient bases for asserting that the Union acted in bad faith in permitting house accounts. Neither does the record support the assertion that the Union mischaracterized any of the Group's offers to its membership. On the record I indicated that I viewed skeptically Respondent's reliance on such cases as *Times Publishing Co*., 72 NLRB 676 (1947), or its progeny as establishing a union lack of good faith, thereby precluding the testing of an employer's own good faith. Nonetheless Respondent now claims in its brief, in error, that not only has the Union done everything to avoid bargaining in an effort to preserve the status quo, but also argues that in its insistence on its members receiving a commission on the sale of every bottle of liquor regardless of whether they engaged in any sales effort the Union has violated Section 8(b)(6) of the Act.[6]

It should first be noted that no refusal to bargain charge against the Union under Section 8(b)(3) nor any charge of violating Section 8(b)(6) has ever been filed. The Group and its members were surely aware of their rights under the Act and their failure to have exercised them in this regard surely must be weighed in determining the bona fides of these assertions. Second, Respondent has never claimed that the sales article XVIII in the expired agreement, whose genesis was described on the record, constituted an unlawful extortion, or featherbedding. As I understood the matter, at least one or more salesman had sold casinos until either the customer of the Group member or both had determined to deal directly. Thus, this article represents a quid pro quo for loss of services previously performed. Similarly, inasmuch as salespersons had originally solicited and serviced a variety of clubs until the Group members started servicing these accounts directly the provision for continued payment of a commission on such sales represents not only a quid pro quo for the loss of the opportunity of salespersons to continue to service them but also represents a renumeration for work which the contract assigned to unit employees. At no time has the Union ceased demanding that the article prohibiting house accounts be continued in any successor agreement and, further, that servicing of accounts and receipt of commissions by supervision be continued to be prohibited. By insisting on the retention of club accounts the Union has been seeking continued work for its salesperson members and not make work or payment for no services. Only by validly bargaining to impasse could the Group place itself in a position to eliminate or convert the club accounts and avoid the continued payment of commissions on them. But by its overall unlawful conduct in this case the Group and its members have failed to achieve that objective to date.

I now turn to consideration of the allegation of discrimination against Edward Primavera.

I conclude that the evidence is insufficient to establish that either the Wall and Lincroft accounts, or the Allaire account, were removed from Primavera for discriminatory reasons. While the removal of the Wall and Lincroft accounts appear slightly more suspect than the Allaire removal, it appears that reassignments of accounts was authorized under section 10:02 when based upon sound business judgment, was not an unusual occurrence, and while Feeney acknowledged that certain factors, relating to Primavera's illness and problems arising from Lincroft's inability to make prompt payments for deliveries of liquor may have soured the Lincroft owner on Primavera, these factors were unrelated to his protected concerted activity. As to Allaire, the documentation of Primavera's shortcomings on servicing and the customer's dissatisfaction over a lengthy period of time before the account was removed also overcome whatever prima facie case the General Counsel may have established, in spite of Royal's failure to provide Primavera with the documentation or even to discuss it with him.

However, in both cases, Primavera was entitled under the contract, which continued in effect after termination with respect to the terms and conditions of employment contained therein, absent a valid impasse, and, independently, by virtue of a practice which the Respondent witnesses did not seriously dispute, to compensation by offers of substitute accounts of substantially equivalent volume. It is noteworthy that a Respondent witness, Louis DeMarino, senior vice president, sales and marketing, of Jaydor interpreted section 10:01 as requiring members of the Group to give dollar for dollar when reassigning accounts (Tr. 785). This was so, even as to the Allaire situation where Feeney and Bilancio did not dispute Primavera's entitlement to compensation for his loss of the account.

The record establishes, however, that no compensation was provided Primavera when he lost Wall and Lincroft, and the promise of a Spirits Unlimited account was never fulfilled. Even when Primavera cultivated his old F & T account when it reopened as a Spirits affiliate, the account was denied him without any explanation. I conclude that the denial of this account as compensation was motivated by Primavera's Union activities, and, further that the failure to provide any compensation for Wall and Lincroft and the inadequate compensation to him in the removal of the Allaire account was similarly motivated. Even if, although I have concluded it was not, the F & T account was belatedly offered to Primavera's, the sum of the three accounts was some $50,000 less in total value in 1994 the year just passed, than the Allaire account, representing a loss to Primavera of some $2500 in commissions annually. Although in 1995 sales volume of the three increased to $77,000 and in 1996 to $113,766, primarily because of the F & T sales, the motivation of Royal's conduct must be measured on the date of the inadequate offer, not a year or two later. Royal's treatment of Primavera was consistent with Bilancio's response when Primavera protested not receiving adequate compensation on account removal, that Primavera's alignment with the Union was a basis for the company to refuse to cooperate with him.

[6] That Section prohibits a labor organization or its agents from causing or attempting to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.

The evidence of the Royal hostility to its employees' exercise of their section 7 rights to strike also support this conclusion as does the failure of Royal to provide any reasonable explanation for its failure to provide any compensation on removal of Wall and Lincroft, to assign the F & T accounts to Primavera, or to provide equivalent compensation on its removal of the Allaire account. I further conclude that Respondent has failed to show by a preponderance of the evidence that it would have denied Primavera equivalent compensation for the reassignment of his accounts absent his protected conduct. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management*, 426 U.S. 393 (1983).

I also conclude that counsel for the General Counsel has failed to establish by a preponderance of the evidence that the Towne Liquors account was discriminatorily denied to Primavera on its reopening or that the Cream Ridge account was disciminatorily withheld from Primavera. In the case of Towne Liquors the evidence supports Royal's defense that salesman Malibashca's prior excellent relationship with the new owner overcame the normal practice of reassigning the account back to Primavera after he had serviced the same location before it closed a year before. As to Cream Ridge, there is insufficient evidence to support Primavera's claim to the account, given its closer proximity to D'Angelo's other accounts. That salesmen who replaced Primavera on these accounts, among others, may have been crossovers is not significant, given the fact that 28 of the 32 of the salesmen in the southern division were in that category.

CONCLUSIONS OF LAW

1. The Respondent Association is an employer within the meaning of Section 2(2) of the Act and Respondents Fedway, Royal, and Jaydor are employers within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing, since about November 1994 to assign to employee Edward Primavera other sales accounts with substantially equal volume, upon its removal from him and reassignment of certain sales accounts, because he assisted the Union and engaged in concerted activities, Respondent Royal has been discriminating in regard to the hire and tenure and terms and conditions of employment of its employees, in violation of Section 8(a)(1) and (3) of the Act.

4. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All sales representatives in the State of New Jersey employed by members of Respondent Association and of the employers who have authorized Respondent Association to bargain on their behalf, including Respondent Fedway, Respondent Royal, and Respondent Jaydor, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

5. At all material times, the Union has been and is now the exclusive collective-bargaining representative of the employees in the unit described above in paragraph 4.

`6. Since on or about March 24, 1994, by insisting to impasse on a wage proposal which, by its terms sought to retain unilateral control over all aspects of wages and compensation, by failing to bargain with the Union as to the timing, criteria and procedures for compensation of employees in the bargaining unit described, and by its overall conduct, including the conduct described, Respondent Association has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

7. By offering its unit employees a section 401(k) plan which had not been previously proposed or made part of the Respondent Association's final contract offer, and at a time when neither the Union nor the Respondent Association had authorized it to bargain separately with the Union, Respondent Fedway, and by unilaterally implementing a part of the Respondent Association's final offer by removing certain customer accounts from their unit employees and designating them as "house accounts" at a time when no valid impasse in bargaining with the Union had occurred, and at a time when neither the Union nor the Respondent Association had authorized them to bargain separately with the Union, Respondents Fedway, Jaydor, and Royal, have failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of their unit employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act.

8. The aforesaid and unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondents Association, Fedway, Jaydor, and Royal have engaged in violations of Section 8(a)(1) and (5) of the Act, I shall recommend that they cease and desist therefrom, and take certain affirmative actions necessary to effectuate the purposes and policies of the Act. The recommended Order shall provide that the Respondents be required to bargain collectively in good faith, upon request, with the Union as the exclusive collective-bargaining representative of the unit employees, and that they be required, if requested by the Union, to restore and apply to all of these employees the wages, compensation and all other terms and conditions of employment of the expired collective-bargaining agreement which ran from October 1, 1990, to September 30, 1993, by and between the Union and the Respondent Association members and their affiliates and successors, before their unlawful unilateral changes, until a valid impasse in bargaining is reached or until an understanding is reached, which shall be embodied in a signed agreement. The order will also require Respondents Fedway, Jaydor, and Royal to make whole unit employees for any losses suffered as a result of their unlawful actions in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682, 683 (1970), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

To the extent that any of the unlawful unilateral changes implemented by the Respondents may have improved the terms and conditions of employment of unit employees, I note that no provision of my recommended Order shall in any way be construed as requiring the Respondents to revoke such improvement.

Having found that the Respondent Royal unlawfully denied compensation to Edward Primavera by failing to provide him with accounts of substantially equal volume when certain accounts of his were reassigned, I shall recommend that it be ordered to provide him with such accounts, and make him whole for any loss of earnings and other benefits he may have suffered as a result of Respondent's Royal's unlawful discrimination against him. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, supra. I shall also recommend that in accordance with the time restraints set forth in *Indian Hills Care Center*, 321 NLRB 144 (1996), Respondent remove from its files any references to the unlawful denial of equivalent accounts and notify him in writing that this has been done and that its failure to provide him with equivalent accounts will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

A. The Respondent Liquor Industry Bargaining Group, Trenton, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 19D, Wine and Liquor Salesmen of New Jersey, United Food and Commercial Workers, AFL–CIO as the exclusive bargaining representative of the employees in the unit described below, by insisting to impasse on a wage proposal which by its terms sought to retain unilateral control over all aspects of wages and compensation, by failing to bargain with the Union as to the timing, criteria and procedures for compensation of employees in the unit, and by its overall conduct:

> All sales representatives in the State of New Jersey employed by members of Respondent Association and of the employers who have authorized Respondent Association to bargain on their behalf, including Respondent Fedway, Respondent Royal, and Respondent Jaydor, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with Local 19D, Wine and Liquor Salesmen of New Jersey, United Food and Commercial Workers, AFL–CIO as the exclusive bargaining representative of the employees in the appropriate unit concerning rates of pay, wages, hours of work and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement.

(b) Within 14 days after service by the Region, mail signed copies of the attached notice marked "Appendix A" to the Regional Director for posting at the offices and places of business of each of its employer member principals. Copies of the notice on forms provided by the Regional Director for Region 22, after being signed by Respondent Association's authorized representative, shall be posted by each of its employer members immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Association and its employer members to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official in a form provided by the Region attesting to the steps that the Respondent Association has taken to comply.

B. The Respondents, Fedway Associates, Royal Division of R & R Marketing, L.L.C., Trenton, New Jersey, and the Jaydor Corporation, Milburn, New Jersey, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 19D, Wine and Liquor Salesmen of New Jersey, United Food and Commercial Workers, AFL–CIO by unilaterally implementing changes in compensation and terms and conditions of employment of unit employees at a time when no valid impasse in bargaining with the Union has occurred and at a time when neither the Union nor the Respondent Association had authorized them to bargain separately with the Union, and by Respondent Fedway offering a form of investment and savings benefit plan popularly known as a section 401(k) plan, which had not been previously proposed or made part of the Respondent Association's final contract offer and at a time when neither the Union nor Respondent had authorized it to bargain separately with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good-faith with the Union as the exclusive bargaining representative of the employees in the appropriate unit described above, concerning rates of pay, wages, hours of work and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed written agreement.

(b) On request, restore and apply to all unit employees, the wages and all other terms and conditions of employment of the expired collective-bargaining agreement which ran from October 1, 1990, to September 30, 1993, by and between the Union and the Respondent Association members and their affiliates and successors, before their unlawful unilateral changes, until a valid impasse in bargaining is reached or until an understanding

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

is reached, which shall be embodied in a signed agreement, and make whole the unit employees for any loss of pay or benefits that they have suffered by reason of the unlawful unilateral changes which the named Respondents have implemented. However, no provision of this Order shall in any way be construed as requiring the Respondents to revoke unilaterally implemented improvements in terms and conditions of employment to unit employees.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, all other records necessary to analyze the amount of backpay benefits, contributions, and reimbursement of expenses due under the terms of this Order.

(d) Within 14 days after service by the Region, post at their respective offices and places of business, located, respectively, in Kearney, New Jersey, Trenton, New Jersey, and Milburn, New Jersey, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director of Region 22, after being signed by each Respondent's authorized representative, shall be posted by each Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Local 19D, Wine and Liquor Salesmen of New Jersey, United Food and Commercial Workers, AFL–CIO as the exclusive representative of our employees in the appropriate unit described below, by insisting to impasse on a wage proposal which by its terms seeks to retain unilateral control over all aspects of wages and compensation, by failing to bargain with the Union as to the timing, criteria and procedures for compensation of employees in the unit, and by our overall conduct:

All sales representatives in the State of New Jersey employed by members of Respondent Association and of the employers who have authorized Respondent Association to bargain on their behalf, including Respondent Fedway, Respondent Royal, and Respondent Jaydor, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the above-named Union as the exclusive representative of all the employees in the appropriate unit concerning rates of pay, wages, hours of work, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed written agreement.

LIQUOR INDUSTRY BARGAINING GROUP

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Local 19D, Wine and Liquor Salesmen of New Jersey, United Food and Commercial Workers, AFL–CIO as the exclusive representative of our employees in the appropriate unit described below by unilaterally implementing changes in compensation and terms and conditions of our unit employees at a time when no valid impasse in bargaining with the Union has occurred and at a time when neither the Union nor the Liquor Industry Bargaining Group, our bargaining representative, has authorized us to bargain separately with the Union, and by Fedway Associates, one of us, offering a form of investment and savings benefit plan, popularly known as a section 401(k) plan, not previously proposed or made part of the Bargaining Group's final contract offer and at a time when neither the Union nor the Bargaining Group had authorized us to bargain separately with the Union:

All sales representatives in the State of New Jersey employed by members of Respondent Association and of the employers who have authorized Respondent Association to bargain on their behalf, including Respondent Fedway, Respondent Royal, and Respondent Jaydor, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the above-named Union as the exclusive representative of all the employees in the appropriate unit described above concerning rates of pay, wages, hours of work and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed written agreement.

WE WILL, on request, restore and apply to all unit employees, the compensation and all other terms and conditions of employment of the expired collective-bargaining agreement which ran from October 1, 1990 to September 30, 1993, by and between the Union and the Respondent Liquor Industry Bargaining Group the Group's members and their affiliates and successors, before we made our unlawful unilateral changes, until we reach a valid impasse in bargaining with the Union or until an understanding is reached, which we shall embody in a signed agreement.

WE WILL make whole our unit employees for any loss of pay or benefits that they have suffered by reason of the unlawful unilateral changes which we have implemented, plus interest. However, no provision of this Order shall in any way be construed as requiring us to revoke unilaterally implemented improvement in terms and conditions of employment of our unit employees.